UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07–35266.

Northwest Environmental Defense Center, Plaintiff–Appellant,

and

Oregon Forest Industry Council; American Forest & Paper Association, Intervenors,

v.

Marvin Brown, Oregon State Forester, in his official capacity; et al., Defendants–Appellees.

Appeal from the United States District Court for the District of Oregon, Garr M. King, District Judge, Presiding. D.C. No. CV–06–01270–GMK.

Argued and Submitted Nov. 19, 2008.
Filed May 17, 2011.

Before: WILLIAM A. FLETCHER and RAYMOND C. FISHER, Circuit Judges, and CHARLES R. BREYER[1] District Judge.

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[1] The Honorable Charles R. Breyer, United States District Judge for the Northern District of California, sitting by designation.

ORDER

This court's opinion filed August 17, 2010, and reported at 617 F.3d 1176, is withdrawn, and is replaced by the attached Opinion.

With the filing of the new opinion, the panel has voted unanimously to deny the petitions for rehearing. Judges Fletcher and Fisher have voted to deny the petitions for rehearing en banc, and Judge Breyer so recommends.

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc, filed October 5, 2010, are DENIED.

No further petitions for rehearing or rehearing en banc will be accepted.

OPINION

W. FLETCHER, Circuit Judge:

Northwest Environmental Defense Center ("NEDC") brings suit against the Oregon State Forester and members of the Oregon Board of Forestry in their official capacities (collectively, "State Defendants") and against various timber companies ("Timber Defendants," and collectively with State Defendants, "Defendants"). NEDC contends that Defendants have violated the Clean Water Act ("CWA") and its implementing regulations by not obtaining permits from the Environmental Protection Agency ("EPA") for stormwater—largely rainwater—runoff that flows from logging roads into systems of ditches, culverts, and channels and is then discharged into

forest streams and rivers. NEDC contends that these discharges are from "point sources" within the meaning of the CWA and that they therefore require permits under the National Pollutant Discharge Elimination System ("NPDES").

The district court concluded that the discharges are exempted from the NPDES permitting process by the Silvicultural Rule, 40 C.F.R. § 122.27, promulgated under the CWA to regulate discharges associated with silvicultural activity. The district court did not reach the question whether the discharges are exempted by amendments to the CWA made in 1987. We reach both questions and conclude that the discharges require NPDES permits.

I. Background

NEDC contends that discharges from systems of ditches, culverts, and channels that receive stormwater runoff from two logging roads in the Tillamook State Forest in Oregon are point source discharges under the CWA. The roads are the Trask River Road, which runs parallel to the South Fork Trask River, and the Sam Downs Road, which runs parallel to the Little South Fork of the Kilchis River. The roads are owned by the Oregon Department of Forestry and the Oregon Board of Forestry. They are primarily used by the Timber Defendants to gain access to logging sites and to haul timber out of the forest. The Timber Defendants use the roads pursuant to timber sales contracts with the State of Oregon. These contracts designate specific routes for timber hauling and require that the Timber Defendants maintain the roads and their associated stormwater collection systems.

Both of the logging roads were designed and constructed with systems of ditches, culverts, and channels that collect and convey stormwater runoff. For most of their length, the roads are graded so that water runs off the road into ditches on the uphill side of the roads. There are several ways these ditches then deliver water into the adjacent rivers. At intervals, the ditches empty into "cross-drain" culverts that cross under the roads. Where the roads are close to the rivers, these culverts deliver the collected stormwater into the rivers. Where the roads are at some distance from the rivers, the roadside ditches connect to culverts under the roads that deliver the collected stormwater into channels, and these channels then discharge the stormwater into the rivers. When tributary streams cross under the roads, the roadside ditches deliver the collected stormwater into these streams. These streams then carry the collected stormwater to the rivers.

The stormwater runoff that flows off the roads and through these collection systems deposits large amounts of sediment into streams and rivers. This sediment adversely affects fish—in particular, salmon and trout—by smothering eggs, reducing oxygen levels, interfering with feeding, and burying insects that provide food.

Timber hauling on the logging roads is a major source of the sediment that flows through the stormwater collection systems. Logging trucks passing over the roads grind up the gravel and dirt on the surface of the road. Small rocks, sand, and dirt are then washed into the collection system and discharged directly into the streams and rivers. NEDC alleged in its complaint that it sampled stormwater discharges at six points along the Trask River Road

and five points along the Sam Downs Road where the Defendants use ditches, culverts, and channels to collect and then discharge stormwater runoff. Each sample contained significant amounts of sediment.

None of the Defendants has sought or received NPDES permits for these discharges into the streams and rivers. NEDC brought suit under the citizen suit provision of the CWA, 33 U.S.C. § 1365(a), which provides that "any citizen may commence a civil action on his own behalf ... against any person" alleged to be in violation of the CWA. NEDC claims that Defendants have violated the CWA by not obtaining NPDES permits. On March 1, 2007, the district court dismissed NEDC's complaint with prejudice under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. NEDC has timely appealed.

II. Subject Matter Jurisdiction

In the original version of our opinion, we did not discuss our subject matter jurisdiction. None of the parties to the suit had raised an objection to subject matter jurisdiction. In an amicus brief, however, the United States had contended that the challenged Silvicultural Rule was unambiguous and that, as a consequence, citizen-suit jurisdiction under 33 U.S.C. § 1365(a) was improper. Instead, the United States had argued, the suit should have been brought under 33 U.S.C. § 1369(b). A defect in subject matter jurisdiction is, of course, not waivable.

Without discussing subject matter jurisdiction, we held on the merits that the Silvicultural Rule is ambiguous. After we published our opinion, one of our colleagues asked us to discuss our subject matter jurisdiction. We asked for supplemental briefing. In

light of our holding that the Rule is ambiguous, the United States now concedes, in a second amicus brief, that we have subject matter jurisdiction under § 1365(a). We agree with the United States.

A citizen can bring a suit under § 1365(a) against any person, including the United States, who is alleged to be in violation of "an effluent standard or limitation" under the CWA. A citizen suit may be brought against a person or entity illegally discharging a pollutant into covered waters without an NPDES permit. *Id.* at § 1365(f)(6). Suits under § 1365, however, are limited by the CWA's judicial review mechanism at § 1369(b). Section 1369(b) provides for the review of various actions of the EPA Administrator, including the promulgation of effluent standards, prohibitions, or limitations, as soon as those actions take place. *Id.* at § 1369(b)(1). Such suits must be brought within 120 days from the date of the Administrator's "determination, approval, promulgation, issuance or denial," unless the basis for the suit arose more than 120 days after the agency action. *Id.* Any action that could have been brought under § 1369(b) "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." *Id.* at § 1369(b)(2).

The basis for NEDC's challenge to the Silvicultural Rule arose more than 120 days after the promulgation of the Rule. As we discuss in greater detail below, the Silvicultural Rule is susceptible to two different readings. Under one reading, the Rule does not require permits for silviculture stormwater runoff. Under this reading, the Rule is inconsistent with the CWA and hence invalid. Under the other reading, the Rule requires permits for the runoff and is consistent with the CWA. The United States

adopted the first reading of the Silvicultural Rule for the first time in its initial amicus brief in this case. Until the United States filed that brief, there was no way for the public to know which reading of the Silvicultural Rule it would adopt. As the government states in its second amicus brief to us,

> At the time an ambiguous regulation is promulgated ... the public cannot reasonably be expected to challenge potential regulatory interpretations that are textually plausible but that the agency has not contemporaneously offered and may never adopt. Indeed, a rule encouraging such challenges to hypothetical interpretations would likely only foster unnecessary litigation.

Because the Silvicultural Rule was subject to two readings, only one of which renders the Rule invalid, and because the government first adopted its interpretation of the Rule in its initial amicus brief in this case, this case comes within the exception in § 1369(b)(1) for suits based on grounds arising after the 120–day filing window. Section 1369(b) therefore does not bar a citizen suit challenging EPA's Silvicultural Rule interpretation first adopted in its initial amicus brief in this case. We thus have subject matter jurisdiction under 33 U.S.C. § 1365(a).

III. Standard of Review

We review de novo a district court's dismissal under Rule 12(b)(6). *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). We accept as true all of NEDC's allegations of material facts and we construe them in the light most favorable to NEDC. *Id.*

We review de novo the district court's interpretation of the CWA and its implementing regulations.

League of Wilderness Defenders/Blue Mts. Biodiversity Project v. Forsgren, 309 F.3d 1181, 1183 (9th Cir. 2002). We defer to an agency's interpretation of its own regulations unless that interpretation is plainly erroneous, inconsistent with the regulation, or based on an impermissible construction of the governing statute. *Auer v. Robbins*, 519 U.S. 452, 457, 461–62 (1997). We review EPA's interpretations of the CWA under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). At *Chevron* step one, if, employing the "traditional tools of statutory construction," we determine that Congress has directly and unambiguously spoken to the precise question at issue, then the "unambiguously expressed intent of Congress" controls. *Id.* at 843. At *Chevron* step two, if we determine that the statute is "silent or ambiguous with respect to the specific issue," we must determine whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 843. An agency interpretation based on a permissible construction of the statute controls. *Id.* at 844.

IV. Discussion

NEDC contends that stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels, and is then delivered into streams and rivers, is a point source discharge subject to NPDES permitting under the CWA. Defendants, however, contend that the Silvicultural Rule exempts such runoff from the definition of point source discharge, and thus exempts it from the NPDES permitting process. Alternatively, Defendants contend that the 1987 amendments to the CWA and regulations implementing those amendments exempt such runoff from the definition of

point source discharge and from the permitting process. We discuss, in turn, the definition of point source discharge, the Silvicultural Rule, and the 1987 amendments to the CWA.

A. Definition of Point Source Discharge

In 1972, in the Federal Water Pollution Control Act ("FWPCA"), Congress substantially revised federal law governing clean water. Pub. L. No. 92–500, 86 Stat. 816 (1972). In 1977, the statute was renamed the Clean Water Act ("CWA"). Pub. L. No. 95–217, 91 Stat. 1566 (1977). Congress enacted the FWPCA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by replacing water quality standards with point source effluent limitations. 33 U.S.C. § 1251(a); *Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1096 (9th Cir. 1998). Section 301(a) of the Act provides that, subject to certain exceptions, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). One of these exceptions is a point source discharge authorized by a permit granted pursuant to the NPDES system under § 402 of the Act. 33 U.S.C. § 1342. The combined effect of §§ 301(a) and 402 is that "[t]he CWA prohibits the discharge of any pollutant from a point source into navigable waters of the United States without an NPDES permit." *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1160 (9th Cir. 2003); *see also Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1010 (9th Cir. 2008). "Pollutants" include "rock" and "sand." 33 U.S.C. § 1362(6). Defendants do not contest that sediment discharges from logging roads constitute pollutants within the meaning of the CWA.

"It is well settled that the starting point for interpreting a statute is the language of the statute itself." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987). Section 502(14) of the Act defines "point source" as

> any *discernible, confined and discrete conveyance,* including but not limited to *any pipe, ditch, channel, tunnel, conduit,* well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14) (emphasis added). The term "nonpoint source" is left undefined.

Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source as defined by § 502(14). As we wrote in *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002):

> Although nonpoint source pollution is not statutorily defined, it is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. Because it arises in such a diffuse way, it is very difficult to regulate through individual permits. The most common example of nonpoint source pollution is the residue left on roadways by automobiles. Small amounts of rubber are worn off of the tires of

> millions of cars and deposited as a thin film on highways; minute particles of copper dust from brake linings are spread across roads and parking lots each time a driver applies the brakes; drips and drabs of oil and gas ubiquitously stain driveways and streets. When it rains, the rubber particles and copper dust and gas and oil wash off of the streets and are carried along by runoff in a polluted soup, winding up in creeks, rivers, bays, and the ocean.

However, when stormwater runoff is collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a "discernable, confined and discrete conveyance" of pollutants, and there is therefore a discharge from a point source. In other words, runoff is not inherently a nonpoint or point source of pollution. Rather, it is a nonpoint or point source under § 502(14) depending on whether it is allowed to run off naturally (and is thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances (and is thus a point source discharge).

Our caselaw has consistently recognized the distinction between nonpoint and point source runoff. In *Natural Resources Defense Council v. California Department of Transportation,* 96 F.3d 420, 421 (9th Cir. 1996), we were asked to enforce an already-issued NPDES permit requiring a state agency using storm drains "to control polluted stormwater runoff from roadways and maintenance yards[.]" In *Natural Resources Defense Council v. EPA* ("*NRDC v. EPA*"), 966 F.2d 1292, 1295 (9th Cir. 1992), we wrote, "This case involves runoff from diffuse sources that even-

tually passes through storm sewer systems and is thus subject to the NPDES permit program." In *Trustees for Alaska v. EPA*, 749 F.2d 549 (9th Cir. 1984), we explicitly agreed with a decision of the Tenth Circuit, *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979). We wrote:

> The [Tenth Circuit] observed that Congress had classified nonpoint source pollution as runoff caused primarily by rainfall around activities that employ or create pollutants. Such runoff could not be traced to any identifiable point of discharge. The court concluded that point and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by *whether the pollution reaches the water through a confined, discrete conveyance.* Thus, when mining activities release pollutants from a discernible conveyance, they are subject to NPDES regulation, as are all point sources.

749 F.2d at 558 (emphasis added) (internal citation omitted). Finally, in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003), we wrote: "Storm sewers are established point sources subject to NPDES permitting requirements.... Diffuse runoff, such as rainwater that is *not* channeled through a point source, is considered nonpoint source pollution and is not subject to federal regulation." *Id.* at 841, 842 n.8 (emphasis added) (internal citations omitted).

The clarity of the text of § 502(14), as well as our caselaw, would ordinarily make recourse to legislative history unnecessary. The "unambiguously expressed intent of Congress" controls. *Chevron*, 467

U.S. at 842–43. However, because EPA relied on the legislative history of the FWPCA in promulgating the Silvicultural Rule at issue in this case, we recount some of that history as background to our analysis of the Rule.

The FWPCA established "distinctly different methods to control pollution released from point sources and that traceable to nonpoint sources." *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002). The Senate Committee elected to impose stringent permitting requirements only on point sources because "[t]here is no effective way as yet, other than land use control, by which you can intercept [nonpoint] runoff and control it in the way that you do a point source. We have not yet developed technology to deal with that kind of a problem." 117 Cong. Rec. 38825 (Nov. 2, 1971) (statement of Sen. Muskie).

The House and Senate committees made clear that the term "point source" was not to be interpreted narrowly. "By the use of the term 'discharge of pollutants' this provision [§ 402] covers any addition of any pollutant to navigable waters from any point source." H.R. Rep. No. 92–911, at 125 (1971). The Senate Committee Report instructed that

> the [EPA] Administrator should not ignore discharges resulting from point sources other than pipelines or similar conduits.... There are many other forms of periodic, though frequent, discharges of pollutants into the water through point sources such as barges, vessels, feedlots, trucks and other conveyances.

S. Rep. No. 92–414, at 51 (1971), 1972 U.S.C.C.A.N. 3668, 3760. Senator Dole explained his understand-

ing of the distinction as it related to the problem of agricultural pollution:

> Most of the problems of agricultural pollution deal with non-point sources. Very simply, a non-point source of pollution is one that does not confine its pollution discharge to one fairly specific outlet, such as a sewer pipe, a drainage ditch or a conduit; thus, a feed-lot would be considered to be a non-point source as would pesticides and fertilizers.

S. Rep. No. 92–414, at 98–99 (1971), 1972 U.S.C.C.A.N. 3668, 3760 (Supplemental Views of Sen. Dole).

Congress did not provide the EPA Administrator with discretion to define the statutory terms. Senator Randolph, the Chairman of the Senate Committee, explained, "We have written into law precise standards and definite guidelines on how the environment should be protected. We have done more than just provide broad directives [for] administrators to follow." 117 Cong. Rec. 38805 (Nov. 2, 1971). Senator Muskie, another major proponent of the legislation, clarified that EPA would provide "[g]uidance with respect to the identification of 'point sources' and 'nonpoint sources.'" 117 Cong. Rec. 38816 (Nov. 2, 1971). However, "[i]f a man-made drainage, ditch, flushing system or other such device is involved and if measurable waste results and is discharged into water, it is considered a 'point source.'" *Id.*

Congress also sought to require permits for any activity that met the legal definition of "point source," regardless of feasibility concerns. For example, Congressman Roncalio of Wyoming proposed an amendment to exempt irrigated agriculture from the

NPDES permit program because it was "virtually impossible to trace pollutants to specific irrigation lands, making these pollutants a nonpoint source in most cases." 118 Cong. Rec. 10765 (Mar. 29, 1972). Opponents objected that the amendment would exclude large point source polluters simply because the channeled water originally derived from irrigated agriculture. Congressman Waldie explained:

> In California there is a vast irrigation basin that collects all the waste resident of irrigation water in the Central Valley and places it in a drain—the San Luis Draining—and transport[s] it several hundreds of miles and then dumps it into the San Joaquin River which flows into the estuary and then into San Francisco Bay. It is highly polluted water that is being dumped in waters already jeopardized by pollution.
>
> Will the gentleman's amendment establish that as a nonpoint source pollution or will it come under the point source solution discharge?

Id. Congressman Roncalio responded that his amendment would not require permitting for this type of activity—that is, that it would redefine these agricultural point sources as nonpoint source pollution. His amendment was then rejected on the House floor. *See id.*

Congress eventually adopted a statutory exemption for agricultural irrigation in 1977, five years after the passage of the FWPCA. *See* CWA § 402(*l*), 33 U.S.C. § 1342(*l*) ("The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agricul-

ture, nor shall the Administrator directly or indirectly, require any State to require such a permit."); CWA § 502(14), 33 U.S.C. § 1362(14) ("This term does not include return flows from irrigated agriculture."). Congress did so to alleviate EPA's burden in having to issue permits for every agricultural point source. "The problems of permitting every discrete source or conduit returning water to the streams from irrigated lands is simply too burdensome to place on the resources of EPA." 123 Cong. Rec. 38956 (Dec. 15, 1977) (statement of Rep. Roberts). Congress did not, however, grant EPA the discretion to exempt agricultural discharges from the general statutory definition of point source discharges. Rather, Congress exempted such discharges by amending the statute. Congress has never granted a similar statutory exemption for silvicultural discharges from the general definition of point source discharges.

Despite the foregoing, Defendants contend that stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels, and is then discharged into streams and rivers, is a nonpoint source discharge. Defendants contend that the Silvicultural Rule exempts such discharges from the definition of point source discharge contained in § 502(14), and therefore from the NPDES permitting system. Alternatively, Defendants contend that the 1987 amendments to the CWA exempted such discharges from the permitting system. We discuss defendants' two contentions in turn.

B. The Silvicultural Rule

1. Adoption of the Rule

In 1973, one year after the passage of the FWPCA, EPA promulgated regulations categorically

exempting several kinds of discharges from the NPDES permit program. Exempted discharges included discharges from storm sewers composed entirely of storm runoff uncontaminated by industrial or commercial activity, discharges from relatively small animal confinement facilities, discharges from silvicultural activities, and irrigation return flow from point sources where the flow was from less than 3000 acres. The exemption for discharges from silvicultural activities provided:

> The following do not require an NPDES permit:
>
> ...
>
> (j) Discharges of pollutants from agricultural and silvicultural activities, including irrigation return flow and runoff from orchards, cultivated crops, pastures, rangelands, and forest lands, except that this exclusion shall not apply to the following:
>
> ...
>
> (5) Discharges from any agricultural or silvicultural activity which have been identified by the Regional Administrator of the Director of the State water pollution control agency or interstate agency as a significant contributor of pollution.

40 C.F.R. § 125.4 (1975). The Natural Resources Defense Council challenged the regulations as inconsistent with the statute. *See Natural Res. Def. Council v. Train*, 396 F. Supp. 1393 (D.D.C. 1975).

EPA defended the challenged regulations on the ground "that the exempted categories of sources are ones which fall within the definition of point source but which are ill-suited for inclusion in a permit pro-

gram." *Id.* at 1395. The district court wrote that EPA has authority to clarify by regulation the definition of nonpoint and point source discharges, but only so long as its regulations comply with the statutory text. *Id.* at 1395–96. In the court's view, the challenged regulations categorically exempted "entire classes of point sources from the NPDES permit requirements." *Id.* at 1396. The court therefore held that the regulations were fatally inconsistent with the definition contained in § 502(14), writing "that the Administrator [of the EPA] cannot lawfully exempt point sources discharging pollutants from regulation under NPDES." *Id.* at 1402.

EPA appealed to the D.C. Circuit. While the appeal was pending, EPA grudgingly promulgated revised regulations. For example, in soliciting public comment on a proposal for a "system for separate agricultural and silvicultural storm sewers" rule in December 1975, EPA wrote:

> In promulgating the [earlier] regulations EPA stated its belief that while some point sources within the excluded categories may be significant contributors of pollution which should be regulated consistent with the purposes of the FWPCA, it would be administratively difficult if not impossible, given Federal and State resource levels, to issue individual permits to all such point sources.... Essentially, these [earlier] regulations providing for exemptions were based on EPA's view (*a view which it continues to maintain is correct*) that most sources within the exempted categories present runoff-related problems not susceptible to the conventional NPDES permit program including

> effluent limitations. *EPA's position was and continues to be* that most rainfall runoff is more properly regulated under section 208 of the FWPCA [which does not require NPDES permits], whether or not the rainfall happens to collect before flowing into navigable waters. Agricultural and silvicultural runoff, as well as runoff from city streets, frequently flows into ditches or is collected in pipes before discharging into streams. EPA contends that most of these sources are nonpoint in nature and should not be covered by the NPDES permit program.

40 Fed. Reg. 56932 (Dec. 5, 1975) (emphasis added).

Two months later, in February 1976, EPA proposed a revised Silvicultural Rule and solicited public comment. EPA wrote,

> [T]he Agency has carefully examined the relationship between the NPDES permit program (which is designed to control and eliminate discharges of pollutants from discrete point sources) and water pollution from silvicultural activities (which tends to result from precipitation events). It has been determined that most water pollution related to silvicultural activities is nonpoint in nature.

41 Fed. Reg. 6282 (Feb. 12, 1976).

EPA continued:

> Those silvicultural activities which are specified in the regulations (rock crushing, gravel washing, log sorting and log storage facilities), and are thus point sources, are subject to the NPDES permit program. Only

> those silvicultural activities that, as a result of controlled water used by a person, discharge pollutants through a discernible, confined and discrete conveyance into navigable waters are required to obtain a § 402 pollution discharge permit.

Id. This passage provides EPA's central criterion for distinguishing between silvicultural point and nonpoint sources. EPA proposed to characterize discharges of pollutants through a discernible, confined and discrete conveyance as point source discharges only when they were "a result of controlled water used by a person." Under this criterion, the proposed rule named as point source discharges only those related to "rock crushing, gravel washing, log sorting, [and] log storage facilities." *Id.* 6283 (Proposed Rule); 41 Fed. Reg. 24711 (Jun. 18, 1976) (Final Rule); 40 C.F.R. § 124.85 (1976). Any other silvicultural discharge of pollutants, even if made through a discernible, confined and discrete conveyance, was considered a nonpoint source of pollutants. In effect, this meant that any natural runoff containing pollutants was not a point source, even if the runoff was channeled and controlled through a "discernible, confined and discrete conveyance" and then discharged into navigable waters.

In its "response to comments" accompanying the final version, EPA provided more general criteria by which to distinguish nonpoint from point sources of pollution. It wrote:

> Basically, nonpoint sources of water pollution are identified by three characteristics:

> (i) The pollutants discharged are induced by natural processes, including precipitation, seepage, percollation [sic], and runoff;
>
> (ii) The pollutants discharged are not traceable to any discrete or identifiable facility; and
>
> (iii) The pollutants discharged are better controlled through the utilization of best management practices, including process and planning techniques.
>
> In contrast to these criteria identifying nonpoint sources, point sources of water pollution are generally characterized by discrete and confined conveyances from which discharges of pollutants into navigable waters can be controlled by effluent limitations. It is these point sources in the silviculture category which are most amenable to control through the NPDES permit program.

41 Fed. Reg. 24710 (Jun. 18, 1976). EPA specifically noted that the single criterion for point sources—resulting from "controlled water used by a person"—was underinclusive. EPA pointed out that some point source discharges take place "regardless of any [prior] contact with water," such as discharges of wood chips and bark directly into navigable water. *Id.*

However, the actual text of the final version of the Silvicultural Rule was little changed from the version proposed in February. *See* 41 Fed. Reg. 24711 (Jun. 18, 1976). The revised Rule provided in pertinent part:

> Silvicultural activities.

(a) Definitions. For the purpose of this section:

(1) The term "silvicultural point source" means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into navigable waters of the United States.

Comment: This term does not include nonpoint source activities inherent to silviculture such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, and road construction and maintenance from which runoff results from precipitation events.

40 C.F.R. § 124.85 (1976). Even though there was no longer a single criterion for identifying point source discharges, the same four activities were specified as producing point source discharges—rock crushing, gravel washing, log sorting and log storage. *Id.* And even though there were now three general criteria for identifying nonpoint sources, the effect of the Rule was to treat all natural runoff as nonpoint pollution, even if channeled and discharged through a discernible, confined and discrete conveyance.

In comments accompanying the proposed Silvicultural Rule in February 1976, EPA provided, in concise form, its justification for the Rule. It wrote:

Technically, a point source is defined as a "discernible, confined and discrete conveyance, including but not limited to any

> pipe, ditch [or] channel * * * " (§ 502(14) of the FWPCA) and includes all such conveyances. However, a proper interpretation of the FWPCA as explained in the legislative history and supported by the [district] court in *NRDC v. Train* is that not every "ditch, water bar or culvert" is "means [sic] to be a point source under the Act [FWCPA]." It is evident, therefore, that ditches, pipes and drains that serve only to channel, direct, and convey non-point runoff from precipitation are not meant to be subject to the § 402 permit program.

41 Fed. Reg. 6282 (Feb. 12, 1976). A sentence-by-sentence analysis shows the weakness of EPA's justification.

In the first sentence, EPA wrote that "[t]echnically, a point source is defined as a 'confined and discrete conveyance, including but not limited to any pipe, ditch, [or] channel.'" The words quoted by EPA in this sentence were a direct (though partial) quotation of the statutory definition of "point source" contained in § 502(14) of the FWPCA. EPA's choice of the word "technically" is somewhat odd and even misleading; perhaps EPA hoped that the word would diminish the force of the statutory definition. But whatever its motive, EPA would have been more accurate if it had written "textually" instead of "technically."

In the second sentence, EPA wrote that "a proper interpretation of the FWCPA as explained in the legislative history and supported by the court in *NRDC v. Train* is that not every 'ditch, water bar or culvert' is 'mean[t] to be a point source under the Act [FWCPA].'" EPA was putting words into the district

court's mouth. The district court did not hold that "not every 'ditch, water bar or culvert' is 'meant to be a point source.'" Rather, the court wrote only that the plaintiff in the case, NRDC, had not made that argument. *See Train,* 396 F. Supp. at 1401 ("NRDC does not contend that every farm ditch, water bar, or culvert on a logging road is properly meant to be a point source under the Act."). Further, and more important, everyone understands that a "ditch, water bar or culvert" *that does not discharge into navigable waters* is not a point source. But the regulation does not exempt only such ditches, water bars or culverts. Instead, it categorically exempts collected runoff from silviculture, whether or not there is a discharge into navigable waters.

Finally, in the last sentence EPA wrote, "It is evident, therefore, that ditches, pipes and drains that serve only to channel, direct, and convey nonpoint runoff from precipitation are not meant to be subject to the § 402 permit program." The text of § 502(14), quoted in the first sentence of the paragraph, is flatly inconsistent with this statement. Under § 502(14), a pollutant comes from a point source if it is collected and discharged through ditches, pipes, channels, and similar conveyances. Section 502(14) says nothing, either explicitly or implicitly, about the source of the water contained in the discharge. Further, even though not every "ditch, water bar, or culvert" is a point source within the meaning of the statute, it hardly follows that a system of ditches, pipes and channels that collects "controlled water used by a person" and discharges it into a river is a point source, while an identical system that collects and discharges natural precipitation is not.

After EPA promulgated the revised Silvicultural Rule, the Court of Appeals for the D.C. Circuit affirmed the district court's disapproval of the 1973 regulations, including the original Silvicultural Rule. *Natural Res. Def. Council v. Costle,* 568 F.2d 1369 (D.C.Cir.1977). The court did not review the revised Silvicultural Rule promulgated in 1976. The court held that EPA did not have the authority categorically to exempt point source discharges. It wrote:

> Under the EPA's interpretation the Administrator would have broad discretion to exempt large classes of point sources from any or all requirements of the FWPCA. This is a result that the legislators did not intend. Rather they stressed that the FWPCA was a tough law that relied on explicit mandates to a degree uncommon in legislation of this type.

Id. at 1375.

The court responded to EPA's argument that a literal interpretation of the FWPCA's definition of "point source" "would place unmanageable burdens on the EPA":

> There are innumerable references in the legislative history to the effect that the Act is founded on the "basic premise that a discharge of pollutants without a permit is unlawful and that discharges not in compliance with the limitations and conditions for a permit are unlawful." *Even when infeasibility arguments were squarely raised, the legislature declined to abandon the permit requirement.*

Id. at 1375–76 (emphasis added). The court concluded:

> The wording of the statute, legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402. Courts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute.

Id. at 1377.

Although the D.C. Circuit did not address the revised Silvicultural Rule in its opinion, its reasoning is no less applicable to the new version of the Rule. The court concluded that EPA does not have the authority to "exempt categories of point sources" from the permitting requirements of § 402. This is so even if EPA contends that the literal terms of the statute would place "unmanageable burdens" on the agency. The FWPCA was a "tough law" that EPA was not at liberty to ignore.

2. The Revised Silvicultural Rule

The current text of the revised version of the Silvicultural Rule is different in only minor respects from the version promulgated in 1976. In pertinent part, the current version provides:

> (b) *Definitions.* (1) *"Silvicultural point source"* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include nonpoint source silvicultural activities such as nursery operations, site preparation, refore-

> station and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.

40 C.F.R. § 122.27.

The text of the CWA distinguishes between point and nonpoint sources depending on whether the pollutant is channeled and controlled through a "discernible, confined and discrete conveyance." CWA § 502(14), 33 U.S.C. § 1362(14). The Silvicultural Rule, by contrast, categorically distinguishes between the two types of discharges depending on the source of the pollutant. Under the Rule, "silvicultural point source" discharges are those discharged through "discernible, confined and discrete conveyance[s]," but only when they are direct discharges of wood chips, bark, and the like, or discharges resulting from "controlled water used by a person." *See* 41 Fed. Reg. 24710 (Jun. 18, 1976); 41 Fed. Reg. 6282 (Feb. 12, 1976). All other discharges of "natural runoff" are nonpoint sources of pollution, even if such discharges are channeled and controlled through a "discernible, confined and discrete conveyance."

A nonexhaustive list of silvicultural point source discharges under the Rule includes discharges "related to rock crushing, gravel washing, log sorting, [and] log storage facilities." A nonexhaustive list of silvicultural nonpoint sources of pollution under the Rule includes "silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance."

The original Silvicultural Rule, which was struck down by the district court in *Train* and on appeal in *Costle*, categorically exempted all discharges from silvicultural activities. The current Rule categorically exempts all discharges from silvicultural activities resulting from natural runoff. The categorical exemption in the current Rule is somewhat smaller than the exemption in the original Rule, but it is a categorical exemption nonetheless. Indeed, in a later rulemaking proposal EPA specifically characterized it as a categorical exemption. *See* 64 Fed. Reg. 46058, 46077 (Aug. 23, 1999) ("Currently, runoff from [the list of "non-point source silvicultural activities"] is categorically excluded from the NPDES program."). The question before us is whether the categorical exemption from the NPDES permit program in the current Rule is based on a permissible interpretation of § 502(14).

We have dealt with the Silvicultural Rule once before. In *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren* ("*Forsgren*"), 309 F.3d 1181 (9th Cir. 2002), several environmental groups sued to enjoin unpermitted aerial spraying of insecticide to combat the Douglas Fir Tussock Moth. Some of the insecticide was sprayed onto the surface of streams. Plaintiffs contended that the aerial spraying was a discharge from a point source requiring an NPDES permit. Relying on the Silvicultural Rule and on two letters and a guidance document from EPA, the Forest Service took the position that the spraying was not a point source discharge, and that a permit was therefore not required. We disagreed with EPA and the Forest Service.

The core of the EPA and Forest Service argument was that "pest ... control" was one of the activities listed in the Silvicultural Rule as not constituting a point source discharge. We wrote:

> The Forest Service's argument fails because the statute itself is clear and unambiguous. The statutory definition of point source, "any discernible, confined and discrete conveyance, including but not limited to any ... vessel," 33 U.S.C. § 1362(14), clearly encompasses an aircraft equipped with tanks spraying pesticide from mechanical sprayers directly over covered waters. The Forest Service cannot contravene the will of Congress through its reading of administrative regulations.

Forsgren, 309 F.3d at 1185–86.

We pointed out that the Rule characterized a pest control discharge as nonpoint only when it was "silvicultural pest control *from which there is natural runoff*." *Id.* Dat 1186 (emphasis in original). If pest control activity resulted in natural runoff, that runoff was not a point source discharge under § 502(14). But it was undisputed in *Forsgren* that aerial spraying of pesticide into streams was not "natural runoff." We had no occasion to rule on, and did not discuss, whether silvicultural activities from which there is natural runoff *that is channeled, controlled, and discharged through a "discernible, confined and discrete conveyance"* is a point source under § 502(14).

We emphatically "reject[ed] the Forest Service's argument that the EPA has the authority to 'refine' the definitions of point source and nonpoint source

pollution in a way that contravenes the clear intent of Congress as expressed in the statute." *Id.* at 1190. We wrote:

> We agree with the D.C. Circuit that the EPA has some power to define point source and nonpoint source pollution where there is room for reasonable interpretation of the statutory definition. However, the EPA may not exempt from NPDES permit requirements that which clearly meets the statutory definition of a point source by "defining" it as a non-point source. Allowing the EPA to contravene the intent of Congress, by simply substituting the word "define" for the word "exempt," would turn *Costle* on its head.

Id. We now reach the question not reached or discussed in *Forsgren*—whether discharge of natural runoff becomes a point source discharge when it is channeled and controlled through a "discernible, confined and discrete conveyance" in a system of ditches, culverts, and channels. We conclude that it does.

In our view, the answer to the question before us is as clear as the answer to the questions presented in *Costle* and in *Forsgren*. The CWA prohibits "the discharge of any pollutant by any person" without an NPDES permit. 33 U.S.C. § 1311(a). The term "discharge of a pollutant" means "*any* addition of any pollutant to navigable waters from *any* point source." 33 U.S.C. § 1362(12)(A) (emphasis added). A "point source" is

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, con-

> centrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. § 1362(14). The definition in no way depends on the manner in which the pollutant arrives at the "discernible, confined and discrete conveyance." That is, it makes no difference whether the pollutant arrives as the result of "controlled water used by a person" or through natural runoff.

We agree with the analysis of the district court in *Environmental Protection Information Center v. Pacific Lumber Co.* (*"EPIC"*), 2003 WL 25506817 (N.D. Cal. 2003). Relying on *Forsgren*, Judge Patel concluded that stormwater runoff from logging roads that was collected in a system of ditches, culverts, and channels, and then discharged into protected water, was a point source discharge requiring an NPDES permit. After an extensive analysis, the district court wrote:

> The water runoff system this action addresses is an elaborate and extensive one. Blending a variety of drainage methods, the system covers a substantial amount of land and addresses a significant amount of water. Where this runoff system involves "surface drainage[ ] or road construction from which there is natural runoff," section 122.27 [the Silvicultural Rule] may control. But where the system utilizes the kind of conduits and channels embraced by section 502(14), section 122.27 does not control: It cannot control, for one, because section 502(14) of the CWA trumps section 122.27's operation, as EPA may not alter the definition of an existing "point source." And it cannot control, for

> another, because section 122.27's own terms are unsatisfied; once runoff enters a conduit like those listed in section 502(14), the runoff ceases to be the kind of "natural runoff" section 122.27 expressly targets. In this latter context, section 122.27 does not—and cannot—absolve silvicultural businesses of CWA's "point source" requirements.

Id. at *15 (internal citations omitted).

As pointed out by the district court in *EPIC*, there are two possible readings of the Silvicultural Rule. The first reading reflects the intent of EPA in adopting the Rule. Under this reading, the Rule exempts all natural runoff from silvicultural activities such as nursery operations, site preparation, and the other listed activities from the definition of point source, irrespective of whether, and the manner in which, the runoff is collected, channeled, and discharged into protected water. If the Rule is read in this fashion, it is inconsistent with § 502(14) and is, to that extent, invalid.

The second reading does not reflect the intent of EPA, but would allow us to construe the Rule to be consistent with the statute. Under this reading, the Rule exempts natural runoff from silvicultural activities such as those listed, but only as long as the "natural runoff" remains natural. That is, the exemption ceases to exist as soon as the natural runoff is channeled and controlled in some systematic way through a "discernible, confined and discrete conveyance" and discharged into the waters of the United States.

Under either reading, we hold that the Silvicultural Rule does not exempt from the definition of

point source discharge under § 512(14) stormwater runoff from logging roads that is collected and channeled in a system of ditches, culverts, and conduits before being discharged into streams and rivers.

C. 1987 Amendments to the CWA

Defendants contend in the alternative that even if the discharges from a system of ditches, culverts, and channels are point source discharges within the meaning of § 502(14), and even if the Silvicultural Rule does not exempt such discharges from § 502(14), the discharges are nonetheless exempt from the permitting process because of the 1987 amendments to the CWA. Defendants made this contention in the district court, but that court did not decide the question.

We can affirm the decision of the district court on any ground supported by the record, even one not relied on by that court. *Thompson v. Paul*, 547 F.3d 1055, 1058–59 (9th Cir.2008). Defendants urge us, if we hold that the Silvicultural Rule does not exempt the discharges, to affirm the district court based on the 1987 amendments. No factual development is necessary given that the district court dismissed under Rule 12(b)(6). The parties have briefed the question in this court. We therefore reach the question.

1. Congressional Approval or Acquiescence

As a threshold matter, we consider whether, in adopting the 1987 amendments to the CWA, Congress *sub silentio* approved of, or acquiesced in, the Silvicultural Rule. We conclude that Congress did not.

In some instances, congressional re-enactment of statutes can be persuasive evidence of approval of

longstanding administrative regulations promulgated under that statute. In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274–75 (1974), the Court wrote, "[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *See also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting and paraphrasing *Bell Aerospace*). But this case is very different from *Bell Aerospace* and *Schor*. First, in both *Bell Aerospace* and *Schor*, the legislative histories made clear that when Congress re-enacted the statutes at issue it was well aware of the existing administrative interpretation of the statutes. Here, by contrast, there is no indication that Congress was aware of the Silvicultural Rule when it adopted the 1987 amendments. There is no mention of, or even allusion to, the Rule anywhere in the legislative history of the amendments. Second, in both *Bell Aerospace* and *Schor*, the relevant portions of the statutes at issue were re-enacted essentially without change. Here, as we explain below, the 1987 amendments fundamentally changed the statutory treatment of stormwater discharges. Third, the language of the original and the re-enacted statutes in both *Bell Aerospace* and *Schor* was readily susceptible to the administrative interpretations of those statutes. Here, by contrast, the relevant statutory language is flatly inconsistent with the Silvicultural Rule.

In other instances, congressional action or inaction can constitute acquiescence in an existing regu-

lation. The Supreme Court has cautioned strongly against finding congressional acquiescence. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 162 (2001), it wrote, "Although we have recognized congressional acquiescence to administrative interpretations of a statute in some circumstances, we have done so with extreme care." After discussing a case in which there had been congressional hearings on the precise issue, and in which thirteen bills had been introduced in unsuccessful attempts to overturn the regulation, the Court wrote, "Absent such overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation." *Id.* at 169–70, n.5. Here, there is no evidence whatsoever of congressional acquiescence in the Silvicultural Rule, let alone "overwhelming evidence."

2. The 1987 Stormwater Amendments

Congress amended the CWA in 1987 to deal specifically with stormwater discharges. Pub. L. No. 100–4, 101 Stat. 7 (1987). Congress added § 402(p) to the CWA, establishing a "phased and tiered approach" to NPDES permitting of stormwater discharges. *See* 55 Fed. Reg. 47994 (Nov. 16, 1990) (describing 33 U.S.C. § 1342(p)). Section 402(p) fundamentally redesigned the CWA's approach to stormwater discharges.

Under the framework created by the FWPCA in 1972, EPA was required to establish a permitting system for all point source discharges of stormwater. Senator Durenberger explained that the Conference Bill that would become the 1987 amendment focused on stormwater point sources.

> The [FWPCA] of 1972 required all point sources, including stormwater dischargers, to apply for NPDES permits within 180 days of enactment by 1973. Despite this clear directive, EPA has failed to require most stormwater point sources to apply for permits which would control the pollutants in their discharge.

132 Cong. Rec. 32380, 32400 (Oct. 16, 1986). Senator Stafford, the Chairman of the Committee on Environment and Public Works reiterated, "EPA should have developed this [stormwater] program long ago. Unfortunately, it did not." 132 Cong. Rec. 32381 (Oct. 16, 1986).

Congress recognized that EPA's difficulties stemmed in part from the large number of stormwater sources falling within the definition of a point source. *See, e.g.*, 131 Cong. Rec. 19846, 19850 (Jul. 22, 1985) (statement of Rep. Rowland) ("Under existing law, the [EPA] must require [NPDES] permits for anyone who has stormwater runoff on their property. What we are talking about is potentially thousands of permits for churches, schools, residential property, runoff that poses no environmental threat[.]"); 131 Cong. Rec. 15616, 15657 (Jun. 13, 1985) (Statement of Sen. Wallop) ("[EPA regulations] can be interpreted to require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source.... Requiring a permit for these kinds of stormwater runoff conveyance systems would be an administrative nightmare.").

In § 402(p), adopted as part of the 1987 amendments, Congress required NPDES permits for the most significant sources of stormwater pollution un-

der so-called "Phase I" regulations. *See* 133 Cong. Rec. 983, 1006 (Jan. 8, 1987) (statement of Rep. Roe) ("[Section 402(p)] establishes an orderly procedure which will enable the major contributors of pollutants to be addressed first, and all discharges to be ultimately addressed in a manner which will not completely overwhelm EPA's capabilities."). Section 402(p) lists five categories of stormwater discharges, including discharges "associated with industrial activity," that are covered in Phase I. 33 U.S.C. § 1342(p)(2)(B). NPDES permits are required for all five categories of discharges. *Id.* §§ 1342(p)(1)–(2). A permit was required for such discharges by 1990. *Id.* § 1342(p)(4)(A).

All remaining stormwater discharges are to be covered by "Phase II" regulations. During Phase II, EPA is to study stormwater discharges not covered by Phase I and to issue regulations based on its study. *Id.* § 1342(p)(5)–(6). In 1999, EPA promulgated a Phase II regulation requiring NPDES permits for discharges from small municipal storm systems and small construction sites. We upheld most of that regulation in *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003), and remanded for further proceedings. EPA has not yet responded to the remand.

Stormwater discharges from churches, schools and residential properties, through rain gutters or otherwise, and from other relatively de minimus sources, are covered under Phase II rather than Phase I. It is within the discretion of EPA to promulgate Phase II regulations requiring, or not requiring, permits for such discharges.

3. Phase I Stormwater Regulations

In 1990, EPA promulgated "Phase I" regulations for the storm water discharges specified in § 402(p). 55 Fed. Reg. 47990 (Nov. 16, 1990); 40 C.F.R. § 122.26. For discharges "associated with industrial activity," which require NPDES permits, EPA's regulations provide:

> Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122.

40 C.F.R. § 122.26(b)(14). The last sentence of this regulation refers to the Silvicultural Rule, thereby purporting to exempt from the definition of "discharges associated with industrial activity" any activity that is defined as a nonpoint source in the Silvicultural Rule. *See id.*

The preamble to the Phase I regulations makes clear EPA's intent to exempt nonpoint sources as defined in the Silvicultural Rule from the permitting program mandated by § 402(p). The preamble provides:

> The definition of discharge associated with industrial activity does not include activities or facilities that are currently exempt from permitting under NPDES. EPA does not intend to change the scope of 40 CFR 122.27 in this rulemaking. Accordingly, the definition of "storm water discharge associated with in-

> dustrial activity" does not include sources ... which are excluded under 40 CFR 122.27.

55 Fed. Reg. 47990, 48011 (Nov. 16, 1990).

In the 1987 amendments, Congress exempted many stormwater discharges from the NPDES permitting process. However, Congress made clear in § 402(p) that it did not exempt "discharges associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B). Indeed, Congress specifically mandated that EPA establish a permitting process for such discharges. *See* 33 U.S.C. § 1342(p)(4)(A) ("[T]he Administrator *shall* establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) ["discharge[s] associated with industrial activity"] and (2)(C)." (emphasis added)). In *NRDC v. EPA*, 966 F.2d 1292 (9th Cir.1992), we struck down a part of EPA's Phase I regulations exempting point source discharges from construction sites of less than five acres. We wrote, "[I]f construction activity is industrial in nature, and EPA concedes that it is, EPA is not free to create exemptions from permitting requirements for such activity." *Id.* at 1306. Similarly, if silvicultural activity is "industrial in nature," § 402(p) requires that discharges from such activity obtain NPDES permits.

Industries covered by the Phase I "associated with industrial activity" regulation are defined in accordance with Standard Industrial Classifications ("SIC"). The applicable (and unchallenged) regulation provides that facilities classified as SIC 24 are among "those considered to be engaging in 'industrial activity.' " 40 C.F.R. § 122.26(b)(14)(ii). It is undisputed that "logging," which is covered under SIC 2411 (part of SIC 24), is an "industrial activity." SIC 2411 defines "logging" as "[e]stablishments primarily

engaged in cutting timber and in producing ... primary forest or wood raw materials ... in the field."

The regulation further defines the term "storm-water discharge associated with industrial activity" as follows:

> For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; *immediate access roads* and rail lines *used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility;* material handling sites;....

40 C.F.R. § 122.26(b)(14)(ii) (emphasis added).

The Timber Defendants contend that logging roads are not "immediate access roads" because they are not confined to the immediate area of the site where the logging takes place. We disagree. The Timber Defendants misunderstand the meaning of the term "immediate" as it is used in the regulations. The preamble to the Phase I regulations provides that "immediate access roads" means "roads which are exclusively or primarily dedicated for use by the industrial facility." 55 Fed. Reg. 47990, 48009 (Nov. 16, 1990).

The Timber Defendants also contend that logging roads are not "primarily dedicated" for use by the logging companies. Again, we disagree. We recognize that logging roads are often used for recreation, but that is not their primary use. Logging companies build and maintain the roads and their drainage systems pursuant to contracts with the State. Logging is also the roads' *sine qua non:* If there were no logging, there would be no logging roads.

Finally, the Timber Defendants contend that, even if the logging industry is classified by the Phase I rule and SIC 2411 as industrial, the logging sites are not "industrial facilities" because they are not typical industrial plants. Therefore, according to the Timber Defendants, any roads serving logging sites cannot be the "immediate access roads" covered by this rule. We continue to disagree. The definition of a "facility" engaging in "industrial activity" is very broad. The applicable Phase I rule provides that many industrial facilities beyond traditional industrial plants "are considered to be engaging in 'industrial activity,'" including mines, landfills, junkyards, and construction sites. 40 C.F.R. § 122.26(b)(14)(iii), (v), (x).

EPA's comments to the Phase I rules explain the breadth of the definition:

> In describing the scope of the term "associated with industrial activity", several members of Congress explained in the legislative history that the term applied if a discharge was "directly related to manufacturing, processing or raw materials storage areas at an industrial plant."

55 Fed. Reg. at 48007. However, EPA stated that it was not limiting the coverage of the rule to discharges referenced in this legislative history. It explained:

> Today's rule clarifies the regulatory definition of "associated with industrial activity" by adopting the language used in the legislative history and supplementing it with a description of various types of areas that are directly related to an industrial process (*e.g.*, indus-

> trial plant yards, immediate access roads and rail lines, drainage ponds, material handling sites, sites used for the application or disposal of process waters, sites used for the storage and maintenance of material handling equipment, and known sites that are presently or have been in the past used for residual treatment, storage or disposal).

Id.

We therefore hold that the 1987 amendments to the CWA do not exempt from the NPDES permitting process stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels, and is then discharged into streams and rivers. This collected runoff constitutes a point source discharge of stormwater "associated with industrial activity" under the terms of § 502(14) and § 402(p). Such a discharge requires an NPDES permit. As we explained in *NRDC v. EPA*, 966 F.2d at 1306, "if[logging] activity is industrial in nature, and EPA concedes that it is [*see* SIC 2411], EPA is not free to create exemptions from permitting requirements for such activity." The reference to the Silvicultural Rule in 40 C.F.R. § 122.26(b)(14) does not, indeed cannot, exempt such discharges from EPA's Phase I regulations requiring permits for discharges "associated with industrial activity."

4. Effect of Remand in *Environmental Defense Center, Inc. v. EPA*

In *Environmental Defense Center*, 344 F.3d at 863, in 2003 we remanded to EPA a portion of its Phase II stormwater regulations to allow EPA to consider, *inter alia*, whether stormwater discharges from logging roads should be included in Phase II

regulations. Amicus United States suggests that we delay ruling on the question whether stormwater discharges from logging roads must obtain permits under § 402(p)—that is, under Phase I regulations—until EPA has responded to the remand. We have just held that § 402(p) provides that stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels is a "discharge associated with industrial activity," and that such a discharge is subject to the NPDES permitting process under Phase I. Whether EPA might, or might not, provide further regulation of stormwater runoff from logging roads in its Phase II regulations does not reduce its statutory obligation under § 402(p). We therefore see no reason to wait for EPA's action in response to our remand in *Environmental Defense Center*.

D. Summary

In some respects, we are sympathetic with EPA. When the FWPCA was passed in 1972, EPA was faced with a near-impossible task. The breadth of the definition of point source discharge contained in § 502(14) meant that EPA was suddenly required to establish an administrative system under which enormous numbers of discharges would be subject to a new and untested permitting process. Faced with this task, EPA exempted several large categories of point source discharges from the process in order to avoid the burden imposed by the breadth of the definition contained in § 502(14).

Recognizing the burden on EPA, as well as on some of the entities subject to the NPDES permitting requirement, Congress subsequently narrowed the definition of point source discharge by providing specific statutory exemptions for certain categories of

discharges. For example, in 1977, Congress exempted return flows from irrigated agriculture to alleviate the EPA's burden in having to permit "every source or conduit returning water to the streams from irrigated lands," which was what the text of the statute had required. 123 Cong. Rec. 38949, 38956 (Dec. 15, 1977) (Statement of Rep. Roberts); *see* CWA §§ 402(*l*), 502(14), 33 U.S.C. §§ 1341(*l*), 1362(14). Then in 1987, ten years later, Congress comprehensively revised stormwater regulation. It did so in part because the existing broad definition of point source discharge risked creating an "administrative nightmare" for the EPA. 131 Cong. Rec. 15616, 15657 (Jun. 13, 1985) (Statement of Sen. Wallop). It also did so in part because under the existing definition a vast number of de minimus stormwater sources, many of which posed no environmental threat, required NPDES permits. As part of the 1987 amendments, Congress enacted § 402(p), which gives discretion to EPA to exclude from the permitting process de minimus sources of stormwater pollution.

However, in cases where Congress has not provided statutory exemptions from the definition of point source, federal courts have invalidated EPA regulations that categorically exempt discharges included in the definition of point source discharge contained in § 502(14). The most directly relevant example is *Costle*, in which the D.C. Circuit invalidated the original version of the Silvicultural Rule which had exempted all discharges from silvicultural activities. Other examples include *National Cotton Council of America v. EPA*, 553 F.3d 927, 940 (6th Cir. 2009) (invalidating EPA rule exempting pesticide residue from permitting requirements because "the statutory text of the Clean Water Act forecloses the EPA's Final Rule"); *Northern Plains Resource Coun-*

cil v. Fidelity Exploration and Development Co., 325 F.3d 1155, 1164 & n.4 (9th Cir. 2003) (refusing to grant deference to EPA's approval of Montana's permitting program that exempted groundwater pollutants from permitting requirements because "[o]nly Congress may amend the CWA to create exemptions from regulation"); *NRDC v. EPA*, 966 F.2d 1292, 1304–06 (9th Cir. 1992) (holding arbitrary and capricious EPA rule exempting various types of light industry and construction sites of less than five acres from permitting requirements). Not all examples involve invalidation of recently promulgated regulations. In *Northwest Environmental Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008), we invalidated an EPA regulation that exempted sewage discharges from vessels from the permitting process. In that case, the invalidated EPA regulation had been on the books since 1973.

Congress intentionally passed a "tough law." *Costle*, 568 F.2d at 1375. But Congress did not intend that the law impose an unreasonable or impossible burden. Congress has carefully exempted certain categories of point source discharges from the statutory definition. For those discharges that continue to be covered by the definition, the permitting process is not necessarily onerous, either for EPA or for an entity seeking a permit. For example, in appropriate circumstances a discharge may be allowed under a "general permit" requiring only that the discharger submit a "notice of intent" to make the discharge. As we explained in *Natural Resources Defense Council v. EPA*, 279 F.3d 1180, 1183 (9th Cir. 2002):

> NPDES permits come in two varieties: individual and general. An individual permit authorizes a specific entity to discharge a pollu-

> tant in a specific place and is issued after an informal agency adjudication process. *See* 40 C.F.R. §§ 122.21, 124.1–124.21, 124.51–124.66. General permits, on the other hand, are issued for an entire class of hypothetical dischargers in a given geographical region and are issued pursuant to administrative rulemaking procedures. *See id.* §§ 122.28, 124.19(a). General permits may appropriately be issued when the dischargers in the geographical area to be covered by the permit are relatively homogenous. *See id.* § 122.28(a)(2). After a general permit has been issued, an entity that believes it is covered by the general permit submits a "notice of intent" to discharge pursuant to the general permit. *Id.* § 122.28(b)(2). A general permit can allow discharging to commence upon receipt of the notice of intent, after a waiting period, or after the permit issuer sends out a response agreeing that the discharger is covered by the general permit. *Id.* § 122.28(b)(2)(iv).

Until now, EPA has acted on the assumption that NPDES permits are not required for discharges of pollutants from ditches, culverts, and channels that collect stormwater runoff from logging roads. EPA has therefore not had occasion to establish a permitting process for such discharges. But we are confident, given the closely analogous NPDES permitting process for stormwater runoff from other kinds of roads, that EPA will be able to do so effectively and relatively expeditiously.

CONCLUSION

For the foregoing reasons, we conclude that stormwater runoff from logging roads that is collected by and then discharged from a system of ditches, culverts, and channels is a point source discharge for which an NPDES permit is required.

We therefore **REVERSE** the district court's grant of Defendants' motion to dismiss, and we **REMAND** to the district court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Northwest Environmental Defense Center, Plaintiff,

v.

Marvin Brown, Oregon State Forester, in his official capacity; et al., Defendants,

and

Oregon Forest Industries Council, and American Forest and Paper Association, Intervenors.

Civil No. 06-1270-KI.

March 1, 2007.

OPINION AND ORDER

KING, District Judge.

Plaintiff Northwest Environmental Defense Center ("NEDC") brings this action under the Clean Water Act ("CWA") concerning discharges of stormwater from ditches alongside logging roads in the Tillamook State Forest. NEDC seeks to require defendants to obtain National Pollutant Discharge Elimination System ("NPDES") permits, which NEDC contends are required by the CWA in this situation. Before the court are State Defendants' (Marvin Brown, Oregon State Forester, and members of the Oregon Board of Forestry, Stephen Hobbs, Barbara Craig, Diane Snyder, Larry Giustina, Chris Heffernan, William Hutchison, and Jennifer Phillippi) Motion to Dismiss (#16) and Forest Products Defendants' (timber companies Hampton Tree Farms, Inc., Stimson Lumber Company, Georgia-Pacific West, Inc., and Swanson Group, Inc., along with intervenors Oregon Forest Industries Council and American Forest and

Paper Association) Motion to Dismiss First Amended Complaint (#21). The United States filed an amicus curiae brief. For the reasons below, I dismiss the First Amended Complaint.

ALLEGATIONS

The logging roads at issue in the Tillamook State Forest are the Trask River Road, running along the South Fork Trask River, and the Sam Downs Road, running along the Little South Fork of the Kilchis River. Ditches, channels, and culverts associated with logging roads often deliver collected stormwater into existing streams and rivers. The stormwater, polluted with sediment and other pollutants, degrades water quality and adversely impacts aquatic life. The discharges on these two roads are not authorized by NPDES permits. The State Defendants own and control the logging roads. The Forest Product Defendants haul timber on the roads and are contractually obligated to maintain the roads. According to NEDC, defendants violated the CWA by discharging pollutants and/or industrial stormwater from point sources along the Trask River Road and Sam Downs Road to waters of the United States without NPDES permits.

LEGAL STANDARDS

A motion to dismiss under Rule 12(b)(6) will only be granted if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his complaint which would entitle him to relief." *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005) (internal quotation omitted). Normally, the review is limited to the complaint, and all allegations of material fact are taken as true and viewed in the light most favorable to the non-moving party. *Id.* The

court is not required to accept "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 972 (9th Cir. 2004), *cert. denied*, 544 U.S. 974 (2005). The court may also review a document extrinsic to the complaint if the authenticity of the document is not contested and the document is integral to the claims. *Fields v. Legacy Health System*, 413 F.3d 943, 958 n.13 (9th Cir. 2005). A second exception is that a court may take judicial notice of matters of public record. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001).

DISCUSSION

I. Standing

The State Defendants contend that NEDC has not sufficiently alleged facts to maintain its representational standing.

NEDC alleges that it is a nonprofit corporation with the mission to protect and conserve the environmental and natural resources of the Pacific Northwest. Its members derive aesthetic, recreational, and other benefits from Oregon's waterways, including the rivers and tributaries near the Trask River Road and Sam Downs Road. NEDC members use and enjoy the Trask and Kilchis rivers, and their tributary waters, for fishing and other recreational activities. NEDC alleges that it has at least one member who is injured by defendants' discharge of pollutants and stormwater.

The State Defendants contend that this allegation is generic and insufficiently concrete and particularized to satisfy standing requirements because the allegation does not identify any specific members. NEDC argues that its allegations are sufficient,

specifically, that it does not need to identify a particular member in the complaint but can provide that information during discovery in a manner designed to protect the privacy interest of its members.

> An organization has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purposes; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Individual members would have standing in their own right under Article III if "they have suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical, ... the injury is fairly traceable to the challenged action of the defendant; and ... it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw,* 120 S. Ct. at 704 (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)).

Ecological Rights Foundation v. Pacific Lumber Co., 230 F.3d 1141, 1147 (9th Cir. 2000) (some internal citations omitted). The "injury in fact" requirement in environmental cases is met if an individual "adequately shows that she has an aesthetic or recreational interest in a particular place, or animal, or plant species and that that interest is impaired by a defendant's conduct." *Id.*

Here, the assertion of CWA protection for the rivers and tributaries near the logging roads is germane to NEDC's purpose. There is also no argument

by defendants that an individual member's participation in the suit is necessary. The dispute centers on whether an individual member has suffered an "injury in fact." The general allegation is that individual NEDC members use the two rivers for recreation and at least one member has been injured by the discharges.

Most of the cases cited by defendants, including *Ecological Rights,* hash out this issue in a motion for summary judgment when there is an evidentiary record, typically in the form of a declaration from an individual member explaining their particular use of the area and injury suffered by the environmental harm. Because this is a motion to dismiss, there is no such declaration. I agree with NEDC that its allegations are sufficient for standing purposes. In particular, it does not appear beyond doubt that NEDC can prove no set of facts in support of its complaint which would entitle it to relief. In a case which survives a motion to dismiss, a particular member can be identified during discovery and the issue raised again in a motion for summary judgment if defendants still believe that standing does not exist. I acknowledge that the court in *Arbor Hill Concerned Citizens Neighborhood Ass'n v. City of Albany, New York,* 250 F. Supp. 2d 48 (N.D.N.Y. 2003), concluded differently and granted a motion to dismiss for lack of standing based on a citizen group's complaint with similar general environmental allegations but no individual members identified. I am unpersuaded by *Arbor Hill's* analysis.

I conclude that the allegations concerning standing are sufficiently pled and do not need to be proven for a particular individual until the summary judgment stage of the proceeding.

II. Viability of a Citizen Suit

The State Defendants contend that NEDC fails to satisfy the CWA's procedural prerequisites to a citizen suit under 33 U.S.C. § 1365.

Under the CWA, a citizen may bring an action against any person "who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator of a State with respect to such a standard or limitation." 33 U.S.C. § 1365(a)(1).

NEDC contends that its allegations that defendants discharged pollutants or industrial stormwater without a valid NPDES permit fall within the statutory limits of a citizen suit. NEDC notes that the CWA definition of effluent standard or limitation includes an unlawful act under § 1311(a). 33 U.S.C. § 1365(f)(1). Section 1311(a), in turn, makes it unlawful to discharge any pollutant except in compliance with the NPDES permit required by § 1342, among other things. NEDC thus argues that a citizen suit to enforce an "effluent limitation" can be based on allegations that the defendant is discharging without an NPDES permit. NEDC also relies on *Ass'n to Protect Hammersley, Eld and Totten Inlets v. Taylor Resources*, 299 F.3d 1007 (9th Cir. 2002) [hereinafter *APHETI*], to argue that citizens may bring suit to require a permit.

Based on NEDC's argument, the State Defendants note that NEDC neither asserts a violation of an order nor identifies a standard allegedly violated. Thus, the issue is limited to whether NEDC properly identified an effluent limitation that has been violated. Briefly, the State Defendants contend that Congress did not require permits for all stormwater

dischargers and the EPA has determined that regulatory action is not needed. The State Defendants rely on 33 U.S.C. § 1342(p), contending that it expressly excludes any point source stormwater discharges at issue here from coverage under the NPDES program until such time as EPA decides to regulate them.

The State Defendants distinguish *APHETI* because it concerned a discharge from aquaculture, which is not expressly addressed in the CWA, unlike the stormwater at issue here. Furthermore, the State Defendants contend that NEDC's quote from *APHETI* was on the issue of whether citizen suits are "stop gaps," precluded in areas in which federal or state regulation is active. The State Defendants contend that issue is irrelevant to the case here.

In *APHETI*, a citizen group brought suit contending that a mussel-harvesting company operating in Puget Sound violated the CWA by discharging pollutants, namely the biological materials emitted from the mussels, without an NPDES permit. The state agency that administered the NPDES permit program had determined that a permit was not required. The court allowed the citizen suit to continue, stating:

> Although the EPA or an authorized state agency may be charged with enforcement of the Clean Water Act, neither the text of the Act nor its legislative history expressly grants to the EPA or such a state agency the exclusive authority to decide whether the release of a substance into the waters of the United States violates the Clean Water Act.

Id. at 1012.

I see nothing distinguishing the case before me that makes this statement any less true. I conclude that NEDC is not barred from bringing this citizen suit.

III. NPDES Permit Requirement

A. Statutory and Regulatory Background

Section 301(a) of the CWA prohibits the discharge of any pollutant into the waters of the United States except in compliance with several provisions, including NPDES permits. 33 U.S.C. § 1311; 33 U.S.C. § 1342. NPDES requirements are violated if a defendant discharges a pollutant to navigable waters from a point source. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001). A few definitions:

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362(6).

> The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not in-

> clude agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14).

The CWA was amended in 1987 to add Section 402(p), which enacted a two-phase regulatory program for stormwater. Phase I imposed a general moratorium on the issuance of NPDES permits to discharges composed entirely of stormwater until October 1, 1994. 33 U.S.C. § 1342(p)(1). Five categories of stormwater discharges were excepted from the moratorium and are known as Phase I discharges. 33 U.S.C. § 1342(p)(2).

Phase I discharges include: (1) a discharge for which a permit was issued before February 4, 1987; (2) a discharge associated with industrial activity; (3) a discharge from a municipal separate storm sewer system serving a population of 250,000 or more; (4) a discharge from a municipal separate storm sewer system serving a population between 100,000 and 250,000; and (5) a discharge for which EPA or the state determines contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. *Id.* Phase I discharges require NPDES permits. 33 U.S.C. § 1342(p)(3).

Section 402(p) also directed EPA to study stormwater discharges, the extent of pollutants in them, and methods to control them to the extent necessary to mitigate impacts on water quality. EPA was required to issue regulations to designate stormwater discharges, other than the Phase I discharges, and to establish a program to regulate them as necessary to protect water quality. 33 U.S.C. § 1342(p)(5)-(6). These are known as Phase II discharges. In 1999,

EPA issued the final Phase II stormwater regulations which designated two additional categories of stormwater discharges that required NPDES permits: (1) municipal separate storm sewer systems (MS4s) serving less than 100,000 people; and (2) construction sites that disturb one to five acres of land. 40 C.F.R. § 122.26(a)(9)(I).

B. NEDC's Theories of Liability

NEDC has two theories of liability. The first theory is that the discharges at issue are regulated under Phase I as point source stormwater discharges associated with industrial activity, namely facilities within Standard Industrial Classification ("SIC") 24 (lumber and wood products) and SIC 2411 (logging). Because the Ninth Circuit held that the silvicultural regulation, 40 C.F.R. § 122.27, does not exempt point source discharges from the NPDES program, and since no other exclusions from the Phase I rule apply, NEDC argues that defendants must obtain NPDES permits for the point source discharges along their haul routes.

NEDC's alternative theory notes that the Ninth Circuit recently invalidated, as applied to forest roads, the NPDES permit exemption for unregulated stormwater discharges codified at 40 C.F.R. § 122.26(a)(9)(I). According to NEDC, this means that any discharge of pollutants from the forest roads at issue remain subject to and prohibited by Section 301(a) unless authorized by an NPDES permit.

C. Application of Section 402(p) to Stormwater Discharges on Forest Roads

Section 402(p) requires an NPDES permit for discharges associated with industrial activity, one of

the so-called Phase I discharges. 33 U.S.C. § 1342(p)(2)(B).

In 1980, EPA promulgated the current silvicultural[1] point source regulation defining those silvicultural activities that constitute point sources and those that constitute nonpoint sources.

> Silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include nonpoint source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and part 233).

40 C.F.R. § 122.27(b)(1).

Defendants contend that the timber harvesting activities and use of the logging roads fall within this

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[1] Silviculture: a branch of forestry dealing with the development and care of forests. Merriam-Webster's Online Dictionary (Jan. 8, 2007), http://www.m-w.com/cgi-bin/dictionary?book=Dictionary &va=silvicultural.

exception and thus require no permit. They also note that timber harvesting operations are expressly defined to be a nonpoint source activity in the regulation. Defendants contend that *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002), supports the proposition that natural runoff includes runoff channeled by forest roads.

NEDC contends that *Forsgren* limited the scope of the permit exemption in 40 C.F.R. § 122.27(a) to cases in which there is natural runoff or nonpoint source pollution, which NEDC argues is not the case for the forest roads at issue.

Defendants dispute NEDC's interpretation of *Forsgren* and contend that in finding that the regulatory list of silvicultural point sources is not exhaustive and that the aerial discharges in question were point sources, the court did not invalidate the portion of the regulation classifying runoff from harvesting operations, surface drainage and road construction and maintenance as nonpoint sources.

The State Defendants contend that the logging roads do not qualify as point sources under the reasoning in *Forsgren*. They argue that *Forsgren* rejected the contention that every road is a point source requiring an NPDES permit because of the residue left on the roads by vehicles which mixes with the stormwater. Instead, *Forsgren* supports the argument that forestry roads from which there is natural runoff are nonpoint sources of pollution.

NEDC contends that it has alleged that the "ditches, culverts, channels, pipes and other mechanisms" on both roads are point sources. According to NEDC, the State Defendants unpersuasively stretch

dicta found in *Forsgren,* a case about the aerial application of pesticides.

In *Forsgren,* plaintiffs contended that the United States Forest Service violated the CWA by instituting an aerial insecticide spraying program over national forest lands without obtaining an NPDES permit. All agreed that the aerial spraying program met all elements of the definition for point source pollution. The Forest Service relied on the silvicultural exemption, arguing that the aerial spraying was a silvicultural pest control activity, defined by the silvicultural exemption as a nonpoint source. *Id.* at 1182-85. The court explained:

> Although nonpoint source pollution is not statutorily defined, it is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. Because it arises in such a diffuse way, it is very difficult to regulate through individual permits. The most common example of nonpoint source pollution is the residue left on roadways by automobiles.... When it rains, the rubber particles and copper dust [from brake linings] and gas and oil wash off of the streets and are carried along by runoff in a polluted soup, winding up in creeks, rivers, bays, and the ocean. Nonpoint source pollution of this kind is the largest source of water pollution in the United States, far outstripping point source pollution from factories, sewage plants, and chemical spills.

Id. at 1184.

The court reasoned that the statutory definition of point source was unambiguous and that the Forest Service "cannot contravene the will of Congress through its reading of administrative regulations." *Id.* at 1185-86. The court applied the modifying phrase, "from which there is natural runoff," to all the activities listed in the sentence. Thus, it held that "the regulation excludes from the definition of point source pollution only those silvicultural pest control activities *from which there is natural runoff,* rather than *all* silvicultural pest control activities." *Id.* at 1186 (emphasis in the original). The court also noted that "nonpoint source pollution involves runoff that picks up scattered pollutants and washes them into water bodies." *Id.* Applying this interpretation to the spraying program, the court concluded: "Because discharging pesticide from aircraft directly over covered waters has nothing to do with runoff, it is not a nonpoint source activity." *Id.* at 1187.

Turning to the first sentence in the silvicultural exemption, the court held that the four activities listed (rock crushing, gravel washing, log sorting, or log storage facilities) are not an exhaustive list of point source activities associated with silviculture. *Id.* at 1188. In conclusion, the court held that the aerial spraying program was a point source that required an NPDES permit. *Id.*

Forsgren is clearly controlling here. Some of the cases cited by the parties are not persuasive because they are pre-*Forsgren* and consider the list of point sources in the exemption to be exhaustive. *See Newton County Wildlife Ass'n v. Rogers,* 141 F.3d 803, 810 (8th Cir. 1998); *O'Aha'Ino v. Galiher,* 28 F. Supp. 2d 1258, 1261 (D. Haw. 1998). Another case, *North Carolina Shellfish Growers Ass'n v. Holly Ridge As-*

socs., 278 F. Supp. 2d 654, 681 (E.D.N.C. 2003) ("The ... Tract contains an extensive network of seventeen ditches specifically designed to concentrate and accelerate the flow of stormwater from the Tract. It is difficult to imagine how drainage from such a network could be deemed 'natural runoff ....'"), makes a brief statement without analysis and thus lacks persuasive power.

Based on *Forsgren,* we know that the term silvicultural point source does not include nonpoint source silvicultural activities of harvesting operations from which there is natural runoff, surface drainage from which there is natural runoff, and road construction and maintenance from which there is natural runoff. NEDC alleges that the point source activities are the building and maintenance of the forest roads and the hauling of timber on the roads. Under § 122.27(b)(1) as interpreted by *Forsgren,* those activities are not point sources when the natural runoff flows into the waters of the United States. We also know from *Forsgren* that "nonpoint source pollution involves runoff that picks up scattered pollutants and washes them into water bodies." *Id.* at 1186. Thus, the fact that pollutants deposited on top of the roads during timber hauling end up being washed into the water bodies does not turn the road system with its associated ditches and culverts into a point source. The road/ditch/culvert system and timber hauling on it is a traditional dispersed activity from which pollution flowing into the water cannot be traced to single discrete sources. *See id.* at 1184. The activities complained of here are a far cry from the act complained of in *Forsgren,* namely, spraying pesticide from an airplane.

NEDC also relies on *Environmental Protection Information Center v. Pacific Lumber* Co., No. C01-2821-MHP, 2003 WL 25506817 (N.D. Cal. Oct. 14, 2003) [hereinafter *EPIC*], to argue that the exemption in 40 C.F.R. § 122.27 cannot encompass things which fall within the statutory definition of point source. NEDC also contends that *EPIC* holds that water collected by the timber company's stormwater system was not natural runoff from nonpoint source silvicultural activities. Based on *EPIC* and *Forsgren,* NEDC argues that 40 C.F.R. § 122.27 does not exempt from the NPDES permit requirement any point source discharge of stormwater associated with silvicultural activities because polluted stormwater that is collected and conveyed to rivers and streams is not natural runoff but rather a point source discharge requiring an NPDES permit.

The United States contends that *EPIC* was wrongly decided when the court declined to defer to the EPA's interpretation of its regulations. An agency's interpretation of its own ambiguous regulation is controlling unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins,* 519 U.S. 452, 461 (1997).

I reviewed *EPIC* and its statement that

> the type of "harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff" identified in section 122.27 cannot encompass the ditches, culverts, channels, and gullies otherwise deemed 'point sources' under section 502(14). Such ditches and culverts fall within section 502(14)'s "point source" category, and section 122.27 cannot alter or modify this definition.

Id. at *14 (internal citations omitted). I am unconvinced, however, and believe that *EPIC* was wrongly decided. It contradicts *Forsgren's* explanation of traditional sources of nonpoint source pollution.

Because I conclude that the silvicultural exemption applies, there is no need to address the parties' arguments about whether there is a Phase I discharge associated with industrial activity. I dismiss the § 402(p) claim.

D. Application of Section 301(a) to Stormwater Discharges on Forest Roads

NEDC argues that if the discharges here are not regulated by Section 402(p), 33 U.S.C. § 1342(p), and the Phase I rules, then the discharges require a permit under Section 301, 33 U.S.C. § 1311. NEDC bases this argument on *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003) [hereinafter *EDC], cert. denied*, 541 U.S. 1085 (2004) contending that the Ninth Circuit rejected EPA's attempt to exempt forest roads from regulation. According to NEDC:

> Since the apparent exemption for forest roads was at the heart of what EPA was told to reconsider, the Phase II exemption does not and cannot exempt stormwater discharges from forest roads from the NPDES permit requirement until EPA has addressed the remand.
>
> . . .
>
> . . . Since the moratorium expired on October 1, 1994, and since EPA has not issued a valid Phase II exemption for stormwater discharges from forest roads, those discharges

> remain subject to Section 301(a)'s general prohibition on the "discharge of pollutants."

Pl.'s Opp'n to Industry's Mot. to Dismiss at 27-28.

Defendants contend that in *EDC*, the court rejected the contention that EPA was required to designate forest roads as sources of stormwater pollution and remanded the issue of whether all stormwater discharges required NPDES permits on procedural, not substantive, grounds. According to Defendants, the remand did not create a regulation but instead restored the status quo, which was no regulation of stormwater on forest roads.

In *EDC*, the Ninth Circuit consolidated three cases which raised 22 constitutional, statutory, and procedural challenges to the Phase II stormwater rule EPA issued in October 1999. In part, Petitioners contended that EPA arbitrarily failed to regulate forest roads under the Phase II rule despite clear evidence of the need for pollution control of the stormwater drainage from those roads. *Id.* at 860-61. EPA raised several procedural arguments but "[did] not seriously address the merits of Petitioners' objections." *Id.* at 862. The court held:

> Having concluded that the objections of the Environmental Petitioners are not time-barred, and that we have jurisdiction to hear them, but that EPA failed to consider those objections on the merits, we remand this issue to the EPA, so that it may consider in an appropriate proceeding Petitioners' contention that § 402(p)(6) requires EPA to regulate forest roads. EPA may then either accept Petitioners' arguments in whole or in part, or reject them on the basis of valid reasons that

> are adequately set forth to permit judicial review.

Id. at 863. In conclusion, the court noted its remand of the forest road issue as well as two other issues and stated: "We affirm all other aspects of the Phase II rule against the statutory, administrative, and constitutional challenges raised in this action." *Id.* at 879.

For the most part, the Ninth Circuit affirmed the Phase II rule. The remand was for limited purposes. The Phase II rule did not set up exemptions, it named additional areas requiring NPDES permits. It does not follow from the Ninth Circuit holding in *EDC* that permits are now required for forest roads while the EPA addresses Petitioners' objections about the lack of regulation on the merits.

This interpretation of the regulatory scheme has been followed in other courts. In *Conservation Law Foundation v. Hannaford Bros. Co.*, 327 F. Supp. 2d 325 (D. Vt. 2004), the court held that a shopping plaza owner did not violate § 301(a) for failing to obtain an NPDES permit for stormwater discharge off the parking lot. *Id.* at 331-32. The plaintiff contended that § 301(a)'s prohibition on all stormwater discharges without permits again became law once the permit moratorium expired on October 1, 1994. The court stated:

> [Plaintiff] may be correct that upon the expiration of the permit moratorium all stormwater discharges without permits were in violation of § 301(a). This is because EPA did not issue the Phase II rules until December 8, 1999 and they did not become effective until February 7, 2000. Thus, it could be ar-

> gued that during the more than five-year period between the end of the moratorium and the effective date of the Phase II rules, all stormwater discharges without a permit, including the Burlington Plaza, were subject to the permit requirement and were violating § 301(a).
>
> The court need not address this question, however. As discussed, the plain language of § 402(p) authorizes EPA to issue regulations designating which stormwater discharges are to be regulated and which are to be left unregulated. When those Phase II regulations went into effect, a stormwater discharge left unregulated fell into compliance with § 402(p) unless EPA or an authorized state agency later exercised its residual designation authority to require an NPDES permit for that discharge. A stormwater discharge that complies with § 402(p) does not violate § 301(a).

Id. at 331 (internal citation omitted).[2]

Accordingly, the motion to dismiss the § 301(a) claim is granted.

IV. Amendment

NEDC seeks leave to amend its complaint if I grant the motion to dismiss but does not explain what additional facts can be alleged. I can think of

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[2] I realize that NEDC alleges that the stormwater discharges are Phase I discharges and the plaintiff in *Hannaford* did not make a similar allegation. NEDC's allegation, however, is a legal conclusion and not an allegation of a material fact that I must accept as true.

none that will change this analysis and conclude that any amendment is futile.

CONCLUSION

Plaintiff's Request for Judicial Notice (#47) is granted.[3] State Defendants' Motion to Dismiss (#16) and Forest Products Defendants' Motion to Dismiss First Amended Complaint (#21) are granted.

IT IS SO ORDERED.

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[3] Several parties requested judicial notice of several exhibits without drawing objection. I grant all such requests. Plaintiff objected to Exhibits 2 through 4 filed by the Forest Product Defendants. The exhibits are portions of briefs filed by the United States in other cases. The Forest Product Defendants relied on the exhibits as evidence of the position of the federal agency charged with interpreting the CWA. Because the United States filed an amicus curiae brief in this action, I will rely on that as the statement of the agency's position and decline to take judicial notice of Exhibits 2 through 4.

STATUTES AND REGULATIONS

33 U.S.C. § 1251 Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective.

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. * * *

* * *

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States.

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * *

33 U.S.C. § 1288. Areawide waste treatment management

* * *

(b) Planning process

(1)(A) Not later than one year after the date of designation of any organization under subsection (a) of this section such organization shall have in operation a continuing areawide waste treatment management planning process consistent with section 1281 of this title. * * *

* * *

(2) Any plan prepared under such process shall include, but not be limited to—

* * *

(F) a process to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and their cumulative effects, runoff from manure disposal areas, and from land used for live-stock and crop production, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

* * *

33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law.

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * *

33 U.S.C. § 1314. Information and guidelines.

* * *

(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution. The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from –

(A) agricultural and silvicultural activities, including runoff from fields and crop and forestlands * * *.

* * *

33 U.S.C. § 1342. National pollutant discharge elimination system.

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

* * *

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

* * *

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of—

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1993, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

* * *

33 U.S.C. § 1362 Definitions

Except as otherwise specifically provided, when used in this chapter:

* * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sew-age, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and in-

dustrial, municipal, and agricultural waste discharged into water. * * *

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * *

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

* * *

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

* * *

33 U.S.C. § 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

* * *

33 U.S.C. § 1369. Administrative procedure and judicial review

* * *

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under

section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(*l*) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

* * *

40 C.F.R. § 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

* * *

(b) *Definitions*

* * *

(13) *Storm water* means storm water runoff, snow melt runoff, and surface runoff and drainage.

(14) *Storm water discharge associated with industrial activity* means the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant. The term does not include discharges from facilities or activities excluded from the NPDES program under this part 122. For the categories of industries identified in this section, the term includes, but is not limited to, storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites; sites used for the application or disposal of process waste waters (as defined at page 401 of this chapter); sites used for the storage and maintenance of material handling equipment; sites used for residual treatment, storage, or disposal; shipping and receiving areas; manufacturing buildings; storage areas (including tank farms) for raw materials, and intermediate and final products; and areas where industrial activity has taken place in the past and significant materials remain and are exposed to storm water. For the purposes of this paragraph, material hand-

ling activities include storage, loading and unloading, transportation, or conveyance of any raw material, intermediate product, final product, by-product or waste product. The term excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas. * * *

40 C.F.R. § 122.27 Silvicultural activities (applicable to State NPDES programs, see § 123.25).

(a) *Permit requirement.* Silvicultural point sources, as defined in this section, as point sources subject to the NPDES permit program.

(b) *Definitions.* (1) *Silvicultural point source* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and part 233).

(2) *Rock crushing and gravel washing facilities* means facilities which process crushed and broken

stone, gravel, and riprap (See 40 CFR part 436, subpart B, including the effluent limitations guidelines).

(3) *Log sorting and log storage facilities* means facilities whose discharges result from the holding of unprocessed wood, for example, logs or roundwood with bark or after removal of bark held in self-contained bodies of water (mill ponds or log ponds) or stored on land where water is applied intentionally on the logs (wet decking). (See 40 CFR part 429, subpart I, including the effluent limitations guidelines).

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Environmental Protection Information Center v. Pacific Lumber Company, et al.

[C 01-2821]

[Caption omitted in printing]

[November 17, 2003]

EPA'S STATEMENT OF NON-OPPOSITION AND MEMORANDUM IN SUPPORT OF PALCO'S MOTION TO DISMISS

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Pursuant to Local Rule 7-3(b), the U.S. Environmental Protection Agency ("EPA") hereby files its Statement of Non-Opposition and Memorandum in Support of Pacific Lumber Company and Scotia Pacific LLC's (collectively "PALCO") Motion to Dismiss.

INTRODUCTION

On July 21, 2001, the Environmental Protection Information Center ("EPIC") filed a citizen suit under section 505(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(a), against PALCO, alleging they violated the CWA by discharging pollutants without a National Pollutant Discharge Elimination System ("NPDES") permit (the First and Second Claims for Relief). *See* First Amended Complaint, ¶¶ 55-62.[1] On September 24, 2001, EPIC filed an amended complaint adding the U.S. Environmental Protection Agency (EPA) as a defendant and containing a challenge under the Administrative Procedure Act to EPA's silvicultural regulation at 40 C.F.R. § 122.27 (the Third Claim for Relief). First Amended Complaint, ¶¶ 63-64. Specifically, EPIC alleged that EPA's regulation was ultra vires because it "effectively exempt[s] discharges of stormwater and pollutants from ditches, channels, pipes, culverts, man-made gullies, and other discrete conveyances associated with silvicultural activities." First Amended Complaint, ¶ 64.

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[1] EPIC does not allege that PALCO's silvicultural operations include discharges from any of the silvicultural point sources listed in 40 C.F.R. § 122.27. Accordingly, EPS's brief is founded on the assumption that PALCO's silvicultural operations at issue in this litigation do not included any of the silvicultural point sources listed in 40 C.F.R. § 122.27.

On October 14, 2003, the court denied EPIC's motion for summary judgment on its Third Claim for Relief. The court ruled that EPA's regulation defining "silvicultural point source" was based on a permissible construction of the Clean Water Act, noting that the scope of EPA's definition, at 40 C.F.R. § 122.27, must be read not to exclude sources that are point sources under the Clean Water Act's definition at section 502(14). 33 U.S.C. § 1362(14). The court stated that its ruling did not affect the legitimacy of EPIC's other claims for relief

On November 3, 2003, PALCO filed a motion to dismiss EPIC's First and Second Claims for Relief. EPA hereby submits this Statement of Non-Opposition and Memorandum in Support of PALCO's Motion to Dismiss pursuant to Local Rule 7-3(b).

STATUTORY BACKGROUND

In 1987, Congress amended the CWA by adding a new section 402(p), 33 U.S.C. § 1342(p), which establishes an orderly, two-phase process for the regulation of storm water point source discharges. In section 402(p)(1), Congress imposed a general moratorium on NPDES permitting requirements for discharges composed entirely of storm water, effective until October 1, 1992. 33 U.S.C. § 1342(p)(1).[2] In section 402(p)(2), Congress identified the following five types of storm water discharges that it excluded from the moratorium: (1) "discharge[s] with respect to which a permit has been issued under [section 402] before February 4, 1987;" (2) "discharge[s] associated

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[2] In the Water Resources Development Act of 1992, Public Law No. 102-580, 106 Stat. 4797, 4862 (1992), Congress extended this date until October 1, 1994, which is the date that currently appears in the U.S. Code.

with industrial activity;" (3) "discharge[s] from a municipal separate storm sewer system serving a population of 250,000 or more" ("large MS4s"); (4) "discharge[s] from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000" ("medium MS4s"); and (5) "discharge[s] for which the Administrator or the State, as the case may be, determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2). These section 402(p)(2) discharges are commonly referred to as "Phase I" discharges.

In section 402(p)(5), Congress directed EPA, in consultation with the States, to conduct studies for the purpose of identifying "storm water discharges or classes of discharges for which permits were not yet required;" determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and establishing procedures and methods to control storm water discharges to the extent necessary to mitigate impacts on water quality. 33 U.S.C. § 1342(p)(5)(A)-(C). Congress further required EPA, following the completion of these studies, to "designate storm water discharges, other than those discharges described in [section 402(p)(2)]" for regulation and to establish a comprehensive program to regulate them. 33 U.S.C. § 1342(p)(6). The regulations designating these sources and establishing a regulatory program for them are known as EPA's "Phase II" storm water regulations. Any remaining point sources not designated under Phases I and II are not required to obtain an NPDES permit for storm water discharges.

ARGUMENT

CWA section 301(a) only prohibits discharges that are not "in compliance" with certain other sections of the Act, including section 402. 33 U.S.C. § 1311(a). Consequently, discharges composed entirely of storm water from PALCO's silviculture operations that are "in compliance" with section 402(p) do not violate section 301(a).[3] PALCO is not required to obtain an NPDES permit for those discharges composed entirely of storm water because they do not fall into any of the categories of discharges regulated by EPA pursuant to its authority under section 402(p) of the CWA. Thus, such discharges do not require a NPDES permit to be "in compliance" with section 402 for purposes of section 301(a).

A. Discharges Composed Entirely of Storm Water From Silviculture Activities are not Subject to Regulation Under the Phase I Storm Water Program.

Congress identified five categories of storm water discharges to be regulated under Phase I of the storm water program: (1) discharges with respect to which a permit has been issued under section 402 before February 4, 1987; (2) discharges associated with industrial activity; (3) discharges from large MS4s; (4) discharges from medium MS4s; and (5) discharges for which the Administrator or the State, as the case may be, determines that the storm water discharge contributes to a violation of a water quality

---

[3] Section 301(a) of the CWA states that "[e]xcept as in compliance with this section and sections [302, 306, 307, 318, 402, and 404] of [the Act], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Of the referenced sections, only section 402 is relevant to this matter.

standard or is a significant contributor of pollutants to waters of the United States. 33 U.S.C. § 1342(p)(2). Storm water discharges from PALCO's silvicultural activities do not fall within any of these categories. First, with the exception of the four specific types of silvicultural activity identified as point sources under 40 C.F.R. § 122.27 (which are not relevant here), storm water discharges from silvicultural activities had not been issued NPDES permits prior to 1987. Therefore, such discharges are not regulated under section 402(p)(2)(A). 33 U.S.C. § 1342(p)(2)(A). In addition, storm water point source discharges from silviculture activities are not regulated under section 402(p)(2)(B) or (C) because they are not discharges from a large or medium municipal separate storm sewer system. 33 U.S.C. § 1342(p)(2)(C) and (D).

Nor is silviculture an "industrial activity" as that term is used in section 402(p)(2)(B). The introductory text to the definition of "storm water discharge associated with industrial activity" in EPA's regulations explains that the term "does not include discharges from facilities or activities excluded from the NPDES program under this part 122." 40 C.F.R. § 122.26(b)(14). In 40 C.F.R. § 122.27(b), EPA excluded runoff from certain silvicultural activities from the NPDES program regardless of whether they were point source discharges. Consequently, EPA did not incorporate silvicultural storm water discharges into the definition of "storm water discharges associated with industrial activities."[4] In fact, the defini-

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[4] EPA recognizes that under this Court's October 14 decision granting EPA's motion for summary judgment on EPIC's Third Claim for Relief, the court stated that "where the runoff system utilizes the kinds of conduits and channels embraced by section

tion of "associated with industrial activities" was litigated in the Ninth Circuit, which did not disturb this portion of the regulation. *NRDC v. EPA*, 966 F.2d 1292, 1301 (9th Cir. 1992).

Moreover, in the Ninth Circuit's recent review of challenges to EPA's "Phase II" storm water regulations, the Court recognized that EPA had not required NPDES permits for forest roads under section 402(p). *Environmental Defense Center v. EPA*, 344 F.3d 832, 861 (9th Cir. 2003). In fact, the Ninth Circuit remanded this issue back to the Agency to address a comment received during the Phase II rulemaking requesting EPA to regulate storm water discharges from forest roads under section 402(p)(6). If storm water runoff discharges from forest roads were already required to have obtained an NPDES permit under the Phase I regulations, then the remand would have been unnecessary.[5]

502(14) [of the CWA], section 122.27 does not control" because it is no longer the kind of "natural runoff" targeted by 122.27. Opinion at 20. However, even if the runoff from PALCO's operations utilizes such "conduits and channels," it is not subject to EPA's Phase I storm water regulations because, as described above, it is not an "industrial activity" as EPA defined the term when it promulgated the Phase I regulations.

[5] EPIC contends that PALCO's operations are "industrial activities" under EPA's Phase I regulations because they fit under Standard Industrial Classification ("SIC") 24 (lumber and wood products), which EPA's Phase I regulations specifically encompass. *See* 40 C.F.R. § 122.26(b)(14)(ii). EPA disagrees. In 1995, EPA submitted a report to Congress on storm water discharges potentially to be addressed by Phase II of the storm water program. The report included a description of the scope of EPA's Phase I regulations. In that report, EPA described SIC code 24 as including facilities that use wood as their primary raw material (such as log storage and handling, untreated wood lumber and residue generation activities, wood surface protection activ-

Finally, PALCO's operations are not included in the final category of Phase I discharges (discharges for which EPA or an authorized State determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States) because neither EPA nor California (which is authorized to administer the NPDES program) has determined that silviculture storm water discharges contribute to a violation of a water quality standard or are a significant contributor of pollutants to waters of the United States. *See* 33 U.S.C. § 1342(p)(2)(E).

B. Storm Water Discharges From PALCO's Silvicultural Activities are not Currently Subject to Regulation Under the NPDES Program.

Under the 1987 amendments, Congress required only those storm water point sources identified in section 402(p)(2) or pursuant to section 402(p)(6) to obtain NPDES permits. Section 402(p)(2) identifies specific categories of discharges required to obtain NPDES permits; under section 402(p)(6), Congress gave EPA the discretion to decide what additional point source storm water point source discharges would require NPDES permits and which would not. 33 U.S.C. § 1342(p)(2) and (p)(6). Moreover, section 402(p)(6) did not require implementation of the

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ities, wood preservation activities, and wood assembly/fabrication activities) and noted that silvicultural activities fell within SIC codes 01-09 (which contain agricultural activities, including forestry). *See* EPA's March 1995 Report to Congress, "Storm Water Discharges Potentially Addressed by Phase II of the NPDES Storm Water Program," at 2-23, n.8 and E-2 to E-3, copy of relevant pages attached hereto as EPA Exhibit "A".

NPDES program for designated sources; rather, it required only that EPA establish a "comprehensive program." Had Congress intended that all storm water point source discharges remain subject to NPDES permit requirements, the directive in section 402(p)(6) that EPA "designate" sources "to be regulated" would be meaningless. 33 U.S.C. § 1342(p)(6). Therefore, even after Phase I and Phase II, a category of unregulated sources remains – those sources that EPA or a State or Tribal permitting authority determines need not be regulated to protect water quality.

EPIC has previously relied on a pre-1987 court decision, *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977), to support its assertion that all point source discharges of pollutants require NPDES permits. This reliance is misplaced. *See* Pl. Motion for Partial Summary Judgment on Third Claim for Relief at 3. Relying on the language of the statute as it existed in 1973, as well as its legislative history, the D.C. Circuit in *NRDC v. Costle* held that Congress intended the NPDES permit to be "the only means" by which a point source discharger can avoid liability under section 301(a). *Costle*, 568 F.2d at 1374. However, the 1987 amendments to the CWA, which added section 402(p), established a new structure for dealing with point source storm water discharges. In effect, section 402(p) overturned the D.C. Circuit's holding as it applied to storm water discharges and authorized EPA to "exempt" certain storm water discharges from NPDES permit requirements by restricting the scope of discharges to be regulated under Phase II to only those point source discharges that EPA determined should be regulated to protect water quality. 33 U.S.C. § 1342(p)(6).

In its Phase II regulations, EPA designated two additional categories of storm water discharges that require NPDES permits: discharges from small municipal separate storm sewer systems ("small MS4s") and discharges from construction sites that disturb one to five acres. 40 C.F.R. § 122.26(a)(9)(i)(A) and (B). Discharges from silviculture do not fall into either of these categories. EPA also created residual designation authority to address two other cases: where EPA or an authorized State or Tribe determines that storm water controls are needed for the discharge based on wasteload allocations that are part of total maximum daily loads ("TMDLs") that address the pollutant of concern and where EPA or an authorized State or Tribe determines that the discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. 40 C.F.R. § 122.26(a)(9)(i)(C) and (D). The Ninth Circuit upheld this "residual designation authority" in *Environmental Defense Center v. EPA*, 344 F.3d at 875. In other words, unless a storm water point source discharge is subject to NPDES permitting under one of the regulatory sections covering Phase II (or under the Phase I regulations), it is not required to obtain an NPDES permit. Neither EPA nor California has made such a determination for discharges from silviculture. In addition, neither EPA nor California has made such a determination for PALCO's operations.

EPA declined to regulate discharges from forest roads in the Phase II rulemaking. This decision was challenged in a petition for review of the regulation in the Ninth Circuit. On September 15, 2003, the Ninth Circuit issued a revised opinion in *Environmental Defense Center, Inc. v. EPA ("EDC")*, which remanded the forest roads issue to EPA "so that it

may consider in an appropriate proceeding Petitioners' contention that section 406(p)(6) requires EPA to regulate forest roads." 344 F.3d at 863. The court found that, in promulgating the Phase II regulations, EPA had not adequately responded to the comments during the rulemaking that section 402(p)(6) requires that the Phase II rule contain provisions regulating storm water discharges from forest roads. If storm water discharges from forest roads were subject to regulation under NPDES, the remand would have been unnecessary.

EPA is currently in the process of developing its response to the remand. Regardless of how EPA may address the court's remand, one thing is clear: the *EDC* opinion recognizes that storm water discharges from forest roads are not currently subject to NPDES permit requirements, and will not be subject to them, unless and until EPA regulates them under section 402(p)(6). In fact, the Ninth Circuit explicitly recognized that EPA could, in its action on remand, reject the Petitioners' contention that section 402(p)(6) requires EPA to regulate storm water discharges from forest roads. *Id.*

CONCLUSION

For the reasons set forth above, PALCO's Motion to Dismiss should be granted.

Respectfully submitted.

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[Signature block omitted in printing]

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

3:06 CV 01270

Northwest Environmental Defense Center v. Marvin Brown, Oregon State Forester, in his Official capacity, et al.

[December 6, 2006]

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UNITED STATES' AMICUS CURIAE BRIEF

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I. INTRODUCTION

The Northwest Environmental Defense Center ("NEDC") has brought this citizen suit against Oregon State officials (state defendants) and private forestry companies pursuant to section 505(a) of the Clean Water Act ("CWA" or "the Act"). 33 U.S.C. § 1365(a). NEDC specifically alleges that the defendants are violating sections 301(a) and 402 of the Act, 33 U.S.C. §§ 1311(a) and 1342, by illegally discharging "pollutants and/or industrial stormwater" from "ditches, channels, culverts, pipes and other 'point sources'" along two forestry roads in Oregon's Tillamook State Forest without NPDES permits.[1] First Amended Complaint (FAC), ¶¶ 2, 4. In addition, NEDC alleges that defendants "have violated the Act by failing to apply for NPDES permits for their discharges from . . . hundreds of other locations throughout Oregon State Forests where logging roads deliver pollutants and/or industrial stormwater to rivers and streams." *Id.* at ¶ 6.

State defendants have filed a motion to dismiss. The American Forest and Paper Association and Oregon Forest Industries Council have also intervened as defendants, and have filed a motion to dismiss on behalf of themselves and the private forestry company defendants (collectively "private defendants"). Tillamook County has also intervened in support of defendants' motions to dismiss. Oral argument on these motions is scheduled for January 17, 2007.

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[1] NPDES stands for National Pollutant Discharge Elimination System.

The United States files this *amicus curiae* brief in support of defendants' motions because the identified storm water runoff from defendants' forestry roads does not violate section 301(a) of the CWA. 33 U.S.C. § 1311(a). First, only "point sources" are subject to the prohibition of section 301(a), and EPA has defined surface drainage or natural runoff from forestry roads as "nonpoint sources" in its regulations at 40 C.F.R. § 122.27. Second, even supposing there are certain point source discharges of storm water from the forestry roads at issue here, neither the statute nor EPA's storm water regulations require such dischargers to obtain an NPDES permit.

II. INTEREST OF THE UNITED STATES

The United States Environmental Protection Agency ("EPA") is the primary agency entrusted by Congress with the responsibility for implementing and enforcing the CWA.[2] 33 U.S.C. §§ 1251-1387. This includes the authority to promulgate regulations. *See* 33 U.S.C. § 1361 (providing that "the Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter"). EPA has a strong interest in this case because it necessarily involves the interpretation of multiple EPA regulations, especially its "silvicultural point source" rule at 40 C.F.R. § 122.27 and its "Phase I" and "Phase II" storm water rules at 40 C.F.R. § 122.26. The United States thus files this *amicus* brief to provide EPA's interpretation of the

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[2] The Secretary of the Army, acting through the U.S. Army Corps of Engineers, administers the section 404 permitting program, with EPA retaining a significant role. *See* 33 U.S.C. § 1344.

relevant Clean Water Act implementing regulations. It is the United States' position that forestry roads like those at issue in this case are not required to secure NPDES permits under a proper construction of section 402 of the CWA. A contrary determination would have significant implications for EPA. In addition, agencies of the United States that construct and maintain forestry roads, such as the U.S. Forest Service within the Department of Agriculture and the Bureau of Land Management within the Department of Interior, also have interests that might be implicated by this case.

The United States has not previously participated in this case. As such, this brief relies on the facts as presented by the parties in their pleadings.

III. STATUTORY AND REGULATORY BACKGROUND

The Federal Water Pollution Control Act, commonly called the Clean Water Act, "is a comprehensive water quality statute designed to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *PUD No. 1 of Jefferson County v. Washington Dep't. of Ecology*, 511 U.S. 700, 704 (1994) (citing 33 U.S.C. § 1251(a)). Section 301(a) of the Clean Water Act ("CWA" or the "Act") prohibits the "discharge of any pollutant" by any person into waters of the United States except in compliance with certain enumerated provisions, among them section 402.[3] 33 U.S.C. § 1311(a). Section

[3] Under the section 402 NPDES program, EPA may issue permits to authorize point source discharges on the condition that the discharges will meet other specified applicable requirements. 33 U.S.C. § 1342(a). In addition, States may administer their own NDPES permit programs for discharges if EPA de-

502(12) defines the term "discharge of a pollutant" to mean any addition of any pollutant to a navigable water from any "point source." 33 U.S.C. § 1362(12). Section 502(14) defines the term point source to mean:

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14). The original 1972 CWA arguably required all point source dischargers to secure an NPDES permit in order to be "in compliance" with section 402. *See NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). In response to this decision, however, Congress amended the Act in 1987 to add section 402(p), which lists five categories of storm water point sources that must be regulated under the NPDES program, and explicitly authorizes EPA to determine whether or not to regulate other storm water point sources. *See* 33 U.S.C. § 1342(p).

A. The Point Source/Nonpoint Source Distinction and EPA's "Silvicultural Point Source" Regulations at 40 C.F.R. § 122.27.

Under the Clean Water Act, all sources of pollution that are not point sources are "nonpoint sources"

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termines that the program meets specified requirements. 33 U.S.C. § 1342(b). Upon approval of a State program, EPA will suspend its issuance of permits under section 402(a).

(NPS).[4] Several sections of the Act provide that EPA is to address nonpoint sources through non-regulatory programs. Section 208 established an "areawide waste treatment management program" to address, among other things, nonpoint sources. *See* 33 U.S.C. § 1288. Section 304(f) requires the Administrator to issue "information, including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from - (A) agricultural and silvicultural activities, including runoff from fields and crops and forest lands . . . ." 33 U.S.C. § 1314(f). Congress also added section 319 to the Act in 1987 authorizing a federal grant program to address nonpoint sources.[5] *See* 33 U.S.C. § 1329.

Pursuant to its responsibilities under the CWA to address both point and nonpoint sources of pollution, EPA has promulgated a "silvicultural point source" regulation defining those silvicultural activities that constitute point sources and those that con-

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[4] While the Act does not expressly define the term nonpoint sources, the Ninth Circuit has construed this term to refer to "pollution that does not result from the 'discharge' or 'addition' of pollutants from a point source." *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842, 849 n.9 (9th Cir. 1987) [hereinafter "*ONRC*"]; *see also National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 166 (D.C. Cir. 1982) (construing the term "nonpoint sources" as a residual category consisting of sources other than point sources).

[5] While the Ninth Circuit has recognized that nonpoint sources "constitute a major source of pollution in the nation's waters," the court also explained that the statute deals with nonpoint sources through non-regulatory programs, not through permitting. *ONRC*, 834 F.2d at 849. Thus, Congress did not intend to subject every source of pollution to a permitting regime.

stitute nonpoint sources. *See* 40 C.F.R. § 122.27. While EPA's current silvicultural point source regulation was adopted in 1980, EPA first adopted a rule regarding pollution from silvicultural activities in 1973. The 1973 rule broadly exempted all silvicultural storm water discharges from the NPDES program, unless EPA or a state permitting agency identified a particular silvicultural activity "as a significant contributor of pollution." 38 Fed. Reg. 18,000, 18,004 (July 5, 1973) (*codified at* 40 C.F.R. § 125.4(j)). The District Court for the District of Columbia overturned this rule in 1975. *See NRDC v. Train*, 396 F. Supp. 1393, 1395 (D.D.C. 1975), *aff'd sub nom*, *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). In response, EPA promulgated new silvicultural regulations in 1976 identifying four categories of silvicultural point sources and including a comment providing several examples of silvicultural nonpoint sources. *See* 41 Fed. Reg. 24,709, 24,711 (June 18, 1976) (originally codified as 40 C.F.R. § 124.85). EPA promulgated these regulations in their current form in 1980. *See* 45 Fed. Reg. 33,290, 33,446-47 (May 19, 1980). The current regulation provides, in pertinent part, as follows:

> Silvicultural point source means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. *The term does not include non-point source silvicultural activities such as . . . harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.*

40 C.F.R. § 122.27(b) (emphasis added).

B. The Clean Water Act's Regulation of Storm Water under Section 402(p)

Section 402 of the CWA, as originally enacted in 1972, did not treat storm water point sources any differently from other point source discharges. In 1987, however, Congress added section 402(p) to the Act specifically to address storm water pollution. *See* Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7. Section 402(p) sets forth specific requirements and schedules for the regulation of storm water point source discharges, establishing a two-step process for addressing storm water pollution. *See* 33 U.S.C. § 1342(p). The two regulatory steps are commonly referred to as "Phase I" and "Phase II." *See Conservation Law Found. v. Hannaford Bros. Co.*, 327 F. Supp. 2d 325, 328 (D. Vt. 2004), *aff'd*, 139 Fed. Appx. 3381 (2d Cir. 2005) [hereinafter "*CLF*"] (discussing Phase I and Phase II). As the district court explained in *CLF*, storm water discharges not regulated by either Phase I or Phase II are excluded from the need to secure an NPDES permit unless EPA (or a state) specifically designates a particular facility as requiring a permit. *Id.* at 330-33.

1. Phase I of the storm water regulatory program.

Section 402(p)(1) imposed a general moratorium on the issuance of NPDES permits to discharges composed entirely of storm water until October 1, 1994,[6] except for discharges identified in Section

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[6] As originally enacted, the Water Quality Act of 1987 extended the permitting moratorium to October 1, 1992. The Water Resources Development Act of 1992, Pub. L. No. 102-580, 106

402(p)(2). 33 U.S.C. § 1342(p)(1). Section 402(p)(2) identified five classes of discharges composed entirely of storm water that were exempted from the section 402(p)(1) permitting moratorium. 33 U.S.C. § 1342(p)(2). These five categories comprise the Phase I discharges.[7] Congress expressly required NPDES permits for these storm water discharges in section 402(p)(3) and directed EPA to promulgate appropriate regulations in section 402(p)(4). EPA promulgated the Phase I regulations in 1990. *See* 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at 40 C.F.R §§ 122.26(a)(1)(i) (a)(1)(iv)). The Ninth Circuit largely upheld these regulations as a valid exercise of EPA authority. *See American Mining Congress v. EPA*, 965 F.2d 759 (9th Cir. 1992); *Natural Resources Defense Council v. EPA*, 966 F.2d 1292 (9th Cir. 1992).

2. Phase II of the storm water regulatory program.

In section 402(p)(5) of the Act, Congress directed EPA, in consultation with the states, to conduct a study for the purposes of identifying "stormwater

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Stat. 4797, 4862 (1992), then extended the moratorium to October 1, 1994.

[7] The five classes of "Phase I" discharges are as follows: "(1) a discharge for which a [NPDES] permit has been issued before February 4, 1987; (2) a discharge associated with an industrial activity; (3) a discharge from a municipal separate storm sewer system serving a population of 250,000 or more ["large MS4s"]; (4) a discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000 ["medium MS4s"]; and (5) a discharge for which the Administrator or the State, as the case may be, determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 33 U.S.C. § 1342(p)(2).

discharges or classes of stormwater discharges for which permits [were not yet] required... ; determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality." 33 U.S.C. § 1342(p)(5). Section 402(p)(6) further required that, based on the results of the 402(p)(5) study, EPA shall:

> issue regulations . . . which designate storm water discharges, other than those discharges described in [section 402(p)(2)] to be regulated to protect water quality, and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

33 U.S.C. § 1342(p)(6).

On December 8, 1999, EPA issued the final Phase II storm water regulations required by section 402(p)(6). *See* 64 Fed. Reg. 68,722, 68,734 (Dec. 8, 1999). EPA's Phase II rules designate two additional categories of storm water discharges that are to be "regulated to protect water quality." 40 C.F.R. § 122.26(a)(9)(i). These two categories of discharges are: (1) municipal separate storm sewer systems (MS4s) serving less than 100,000 persons; and (2) construction sites that disturb one to five acres of land. *Id.* EPA did not designate any other source categories in this rule, meaning anything beyond the

source categories in Phase I and Phase II would ordinarily not need an NPDES permit. However, as noted earlier, EPA did retain the authority (both for itself and state NPDES permitting agencies) to subsequently designate sources on a case-by-case basis as requiring an NPDES permit where the permitting agency determines that: (1) storm water controls are needed based on wasteload allocations contained in total maximum daily loads (TMDLs), 40 C.F.R. § 122.26(a)(9)(i)(C); or (2) the discharge or category of discharges contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States, 40 C.F.R. § 122.26(a)(9)(i)(D).

EPA's Phase I and Phase II regulations have largely withstood judicial scrutiny. In *Environmental Defense Center v. EPA.*, 344 F.3d 832 (9th Cir. 2003) [hereinafter "*EDC*"], *cert. denied, Texas Cities Coalition on Stormwater v. EPA*, 541 U.S. 1085 (2004), the Ninth Circuit upheld EPA's Phase II regulations against various challenges in all respects except two. First, the court found that public notice and comment is required for "notices of intent" seeking coverage under the general permit issued for small MS4s. Second, the court ordered EPA to "consider in an appropriate proceeding the Environmental Petitioners' contention that § 402(p)(6) requires EPA to regulate forest roads." *Id.* at 879. The court found that, in promulgating the Phase II regulations, EPA had not adequately responded to comments asserting that section 402(p)(6) compels EPA to require NPDES permits for storm water discharges from forest roads. *Id.* at 861. While the court remanded a portion of the Phase II rule to EPA for a substantive explanation of its decision, it neither vacated the Phase II rules nor suggested an outcome for the re-

mand. In fact, the Ninth Circuit expressly recognized EPA's authority to decide not to regulate forestry roads under the NPDES permitting program. *Id.* at 844.

In summary, the Phase I and Phase II storm water programs, which the Ninth Circuit has sustained, collectively impose permitting obligations on the following: (1) small, medium and large municipal separate storm sewer systems (MS4s); (2) storm water discharges associated with industrial activity; and (3) storm water discharges from construction sites disturbing one or more acres. *See* 40 C.F.R. § 122.26(a) - (b). In addition, EPA and authorized state agencies retain residual authority to designate additional discharges for inclusion in the NPDES permit program in prescribed circumstances. *See* 40 C.F.R. § 122.26(a)(9)(C)-(D). Accordingly, storm water discharges that do not fall within one of these categories are not required to obtain NPDES permits.

IV. ARGUMENT

This case turns on the application of two sets of EPA's regulations: one that defines the dividing line between point and nonpoint sources of pollution related to silviculture (40 C.F.R. § 122.27), and one defining which storm water discharges are subject to the NPDES permitting requirement (40 C.F.R. 122.26). The plain language of EPA's silviculture regulations, promulgated over thirty years ago, exclude runoff from forest roads from the requirement to obtain an NPDES permit. Also, through a series of rulemakings addressing storm water discharges, EPA has chosen not to subject such runoff to regulation under the agency's storm water permitting program.

In this citizen suit, NEDC has not challenged the validity of those regulations, nor could it do so. Because those regulations were subject to review under section 509(b)(1) of the Act,[8] the statute expressly precludes their being reviewed in this proceeding. 33 U.S.C. § 1369(b)(2). Under section 509 of the CWA, Congress expressly mandated that suits challenging regulations may be brought solely in the Courts of Appeals within a specified period of time, which has long since past.

Therefore, the sole issue to be decided by this Court is whether the runoff from forestry roads that are the subject of this lawsuit require NPDES permits under the applicable EPA regulations. As explained below, the plain language, administrative history, and governing judicial decisions all make clear that run-off from forestry roads are not subject to the NPDES permitting requirement for two independent reasons: (1) they constitute nonpoint source pollution under 40 C.F.R. 122.27; and (2) they are not among the categories of storm water discharges requiring permits under 40 C.F.R. 122.26. NEDC's complaint plainly misinterprets EPA's regulations in arguing that such runoff requires NPDES permits.

Finally, the very issues in this case are presently pending before the Agency in a remand from the Ninth Circuit. *See EDC*, 344 F.3d at 879. In that remand, EPA is evaluating the applicability of the

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[8] Section 509(b)(1) of the CWA, 33 U.S.C. § 1369(b)(1), provides for review in the United States Court of Appeals of the regulations governing the issuance of permits under section 402. *NRDC v. EPA*, 656 F.2d 768, 775 (D.C. Cir.1981); *cf. E.I. du-Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977) (reviewing regulations issued under CWA section 301).

storm water permitting program to runoff from forest roads. As explained below, the terms of the Ninth Circuit remand make clear that, under current regulations, such runoff is not subject to the NPDES permitting requirement. As part of EPA's evaluation, the agency is considering whether storm water discharges from forest roads should be part of the comprehensive regulatory program under section 402(p)(6), and if so, what type of further actions are warranted.

A. EPA's Silvicultural Point Source Regulation Defines Discharges from Forestry Roads as Nonpoint Sources, thus Excluding them from the NPDES Permitting Program.

CWA sections 208, 301(a), 304(f), 319, 402, 501(a) and 502(14) authorize EPA to promulgate regulations defining the line between point source and nonpoint source pollution with respect to forestry activities.[9] *See* 33 U.S.C. §§ 1288, 1311(a), 1314(f),

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[9] For example, section 304(f) of the CWA required EPA to issue "guidelines for identifying and evaluating the nature and extent of *nonpoint sources of pollutants*" and to address methods to control pollution resulting from "*agricultural and silvicultural activities, including runoff from fields and crops and forest lands*." 33 U.S.C. § 1314(f)(emphasis added). Section 208 of the Act also required EPA to support the states in developing "a process to (i) identify, if appropriate, agriculturally and *silviculturally related nonpoint sources of pollution*, ... , and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." 33 U.S.C. § 1288(b)(2)(F)(emphasis added). Congress added section 319 to the Act in 1987, which required each state to prepare a management program for nonpoint sources and authorizes a federal grant program to address pollution from these sources. *See* 33 U.S.C. §§ 1329(b)(1), 1329(h).

1329, 1342, 1361(a), 1362(14). Pursuant to these statutory grants of authority, EPA promulgated its "silvicultural point source" regulation in 1980. *See* 45 Fed. Reg. at 33,446-47 (codified at 40 C.F.R. § 122.27). These regulations define surface drainage or natural runoff from forestry roads as a nonpoint source that is not subject to the NPDES permitting program.

1. EPA's Silvicultural Point Source Regulation at 40 C.F.R. § 122.27 defines storm water from forestry roads as a nonpoint source.

For over thirty years, EPA has consistently interpreted both the Clean Water Act and its implementing regulations to define discharges from forestry roads as nonpoint sources. Starting in 1973, EPA issued a report on silvicultural activities, noting generally that "pollution from forests is nonpoint in origin, and defies control or treatment in the conventional sense." *See Processes, Procedures, and Methods to Control Pollution Resulting from Silvicultural Activities*, EPA 430/9-73-010 (Oct. 1973); 38 Fed. Reg. 29,109 (Oct. 16, 1973) (excerpts attached as Exhibit A). Consistent with this conclusion, EPA originally promulgated regulations that did not distinguish between silvicultural point and nonpoint sources, but noted that such forestry activities need not secure permits unless a specific source or category was designated for regulation by EPA. As noted above, these regulations were invalidated.[10] *See NRDC v. Costle*, 568 F.2d 1369.

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[10] However, in invalidating these regulations, the district court in *NRDC v. Train* noted that "NRDC does not contend that every farm ditch, water bar, *or culvert on a logging road* is

The Court in *NRDC v. Costle* found that once EPA defined a discharge as a "point source," it had to regulate that source, but noted that EPA does have authority to exclude some sources from regulation by defining them as "nonpoint sources." *Id.* at 1377. EPA then adopted revised regulations in 1976 identifying four silvicultural activities as point sources. This rule included a comment as part of the regulation explaining that the definition of silvicultural point source "does not include nonpoint source activities inherent to silviculture such as . . . *road construction and maintenance from which runoff results from precipitation events.*" 40 C.F.R. § 125.54 (1976) (emphasis added). When EPA adopted the regulations in their present form in 1980, the agency incorporated the comment from the 1976 rule directly into the body of the definition of "silvicultural point source," slightly modifying the last phrase of the sentence quoted below as follows:

> The term [silvicultural point source] does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, *or road construction and maintenance from which there is natural runoff.*

40 C.F.R. § 122.27(b) (emphasis added).[11] This regulation excludes discharges from silvicultural roads

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properly meant to be a point source under the Act." 396 F. Supp. at 1401 (emphasis added).

[11] EPA also promulgated related regulations clarifying when NPDES permits are not required for silvicultural activities. NPDES permits are not required for "any introduction of pollu-

that are "maintained" in the sense that they are actively in use. The regulation's exclusion of forestry roads from the definition of point source includes "initial transport of forest products from an active harvest site." 60 Fed. Reg. 50,804, 50,835 (Sept. 29, 1995). As explained below, such a long-standing agency interpretation is entitled to substantial deference.

Indeed, the courts have agreed with EPA's construction. In particular, the Ninth Circuit read the above-quoted regulation (section 122.27) to exclude activities such as those at issue here from the definition of "point source" in *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1186 (9th Cir. 2002) [hereinafter "*Forsgren*"]. In *Forsgren*, the court heard a challenge to U.S. Forest Service pest control operations, and held that the statutory definition of "point source" in section 502(14) of the CWA "clearly encompasses an aircraft equipped with tanks spraying pesticide from mechanical sprayers directly over covered waters."[12] 309 F.3d at 1185. In so holding, however, the court explained that activities like those at issue here properly constitute nonpoint sources. The court first read the phrase "from which there is natu-

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tants from non point-source agricultural and silvicultural activities, including storm water runoff from . . . forest lands, but not discharges from . . . silvicultural point sources as defined in § 122.27." 40 C.F.R. § 122.3.

[12] In reaching the holding that the CWA definition of point source covered the silviculturally-related pest control activities at issue in that case, the *Forsgren* court read the first sentence of section 122.27 to provide a non-exhaustive enumeration of silvicultural point sources. *Forsgren*, 309 F.3d at 1188, n. 7. This reading of the first sentence of the regulation does not affect the analysis here, however, since it is the court's broad reading of the second sentence that is controlling in this case.

ral runoff' to modify all of the activities listed in the second sentence of the regulation, and proceeded to note that "silvicultural pest control *from which there is natural runoff* would be an example of a 'nonpoint source silvicultural' activity *not* included in the term 'point source.'" *Id.* at 1186 (emphases added). Consequently, under the Ninth Circuit's interpretation of the regulation, forestry roads *from which there is natural runoff* are likewise "nonpoint sources" of pollution. This reading of the regulation is also consistent with the decisions of other courts that have read section 122.27's definition of point sources narrowly - and its illustrative list of silvicultural nonpoint sources broadly. *See Newton County Wildlife Ass'n v. Rogers*, 141 F.3d 803, 810 (8th Cir. 1998); *Sierra Club v. Martin*, 71 F. Supp. 2d 1268 (N.D. Ga. 1996).

Other Ninth Circuit cases further support the treatment of discharges from forestry roads as nonpoint sources. In *Oregon Natural Resources Council v. U.S. Forest Service*, 834 F.2d 842 (9th Cir. 1987) [hereinafter "*ONRC*"], an environmental group challenged a U.S. Forest Service timber sale arguing (among other things) that the nonpoint source pollution created by harvesting activities would cause a violation of Oregon water quality standards. In disposing of this case, the Ninth Circuit noted that the pollution caused by the forestry harvesting activities at issue was from nonpoint sources. *Id.* at 849; *see also Oregon Natural Desert Assoc'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998) (noting that "examples of nonpoint source pollution include . . . silvicultural activities").

Nevertheless, NEDC's complaint seeks to distinguish forestry roads from the nonpoint source activities listed in section 122.27. NEDC argues that

"stormwater that is collected, conveyed, and delivered to waters of the United States by ditches, culverts, channels, pipes and other mechanisms ... is not 'natural runoff.'" FAC at ¶68. This assertion is inconsistent with both the Ninth Circuit's reasoning in *Forsgren*, and its assumption in *ONRC* that the forest harvesting activities in that case involved only nonpoint sources. NEDC's reading of the phrase "natural runoff" is also inconsistent with EPA's intended meaning of the phrase.

Throughout the history of its silvicultural point source rule, EPA has employed phrases such as runoff "from precipitation events," runoff "induced by natural processes," and "natural runoff" as interchangeable terms. In fact, in the 1976 rule, EPA used the phrase "from which runoff results from precipitation events," 40 C.F.R. § 125.54 (1976), and contemporaneously explained in the preamble that nonpoint sources are identified by the following three characteristics:

> (i) The pollutants discharged are *induced by natural processes*, including precipitation, seepage, percolation, and runoff; (ii) The pollutants discharged are not traceable to any discrete or identifiable facility; and (iii) The pollutants discharged are better controlled through the utilization of best management practices, including process and planning techniques.

41 Fed. Reg. 24,709, 24,710 (June 18, 1976) (emphasis added). Subsequently, in 1980, EPA used the term "natural runoff" for the first time in its consolidated permit application regulations. *See* 45 Fed. Reg. 33,290, 33,447 (May 19, 1980). In promulgating these rules, EPA inserted the comment from the

1976 regulation into the body of the new rule, and changed the phrase "from which runoff results from precipitation events" to "from which there is natural runoff" without comment. EPA did not intend any substantive change to the regulation. Thus, the term "natural runoff" simply means "runoff from precipitation events."

While NEDC apparently reads the term "natural runoff" to limit the list of nonpoint sources in the second sentence of section 122.27 to pollutant-free runoff flowing over pristine landscapes, such an interpretation would render the second sentence of the rule superfluous because by definition section 301(a) does not apply to unpolluted discharges. Unsurprisingly then, NEDC's interpretation conflicts with Ninth Circuit decisions explaining that "constructions which render regulatory provisions superfluous are to be avoided." *Association to Protect Hammersley v. Taylor Res.*, 299 F.3d 1007, 1018-1019 (9th Cir. 2002) [hereinafter "*Hammersley*"] (*citing Rainsong Co. v. FERC*, 151 F.3d 1231, 1234 (9th Cir. 1998)).

Moreover, NEDC's interpretation of section 122.27 ignores the plain language of the regulation. The regulation refers to "road construction and maintenance." It is practically impossible to construct and maintain a road without including systems for the control of precipitation through ditches, culverts and the like. Otherwise, the roads would wash out. These structures are an integral part of forest roads and reading them as outside the scope of the regulation does not make sense because it defeats the plain language of the regulation.

2. This Court should defer to EPA's reasonable interpretation of its own regulations.

This Court should defer to EPA's interpretation of its own regulations. The Supreme Court has stated that courts are to extend "substantial deference to an agency's interpretation of its own regulations," unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (deferring to Secretary of Labor's interpretation of Department of Labor regulations as contained in the *amicus* brief of the United States); *accord Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512-13 (1994) (deferring to Secretary of Health and Human Services' interpretation of a Medicare regulation); *see also Udall v. Tallman*, 380 U.S. 1, 16 (1965) (noting that "when the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order"). EPA's reading of its "silvicultural point source" regulation warrants the same deference because it is neither "plainly erroneous" nor "inconsistent" with the CWA.

For over thirty years EPA has interpreted multiple iterations of its regulations regarding silvicultural activities to define natural runoff from forestry activities (including roads) as not subject to the NPDES program. Elevated deference is particularly called for where, as here, an agency has "consistently followed" the same interpretation of its regulations. *A&W Smelter and Refiners v. Clinton*, 146 F.3d 1107, 1112 (9th Cir. 1998); *accord McCoog v. Hegstrom*, 690 F.2d 1280, 1284 (9th Cir. 1982). Deference is also appropriate where a court is interpreting complex regulations such as those EPA has promulgated to

administer the CWA. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 n.9 (1980) (stating that deference to an agency's interpretation of regulations is rooted in respect for agency expertise in the area).

Indeed, in a case closely analogous to this one, the Ninth Circuit in *Hammersley* extended just such deference to EPA regulations defining point and nonpoint sources. *See* 299 F.3d at 1018-1019. There the court found that a mussel farm was not a point source by deferring to EPA regulations at 40 C.F.R. § 122.24(a). Because the EPA regulations in *Hammersley* "expressly excluded" facilities such as the one at issue in that case from the definition of point source, the court held that it could not disregard EPA regulations and declare this facility a point source under the statutory definition. The court reasoned that a contrary decision would "undermine the agency's interpretation of the Clean Water Act." *Id.* at 1019. As in *Hammersley*, this Court should defer to the EPA regulations defining point and nonpoint sources.

3. This court should not follow *EPIC*, which misinterprets EPA's regulation and the CWA and failed to give proper deference to the Agency.

NEDC cannot reasonably avoid all of the above-cited controlling precedent by resorting to an incorrectly decided district court opinion, *Environmental Protection Information Center v. Pacific Lumber Company*, 301 F. Supp. 2d 1102 (N.D. Cal. 2004) [hereinafter "*EPIC*"]. In *EPIC*, the district court declined to defer to EPA, and held that the forestry roads at issue in that case entailed point source discharges because they involved "the kind of conduits and channels embraced by section 502(14) ... and sec-

tion 122.27 does not - and cannot - absolve silvicultural business of CWA's 'point source' requirements." *Id.* at 1113. But *EPIC* was incorrectly decided. *EPIC* is in direct conflict with *Hammersley* and the other cases cited in this section above, because the *EPIC* court declined to extend any deference to EPA's interpretation of its silvicultural point source regulations. Furthermore, *EPIC* conflicts with *Forsgren's* reading of the regulation and is in tension with the Ninth Circuit's assumption in *ONRC* that silvicultural harvesting entails nonpoint sources. *See* discussion *supra* at 14-15.

The court in *EPIC* also failed to give proper deference to EPA's interpretation of the CWA as reflected by the agency's section 122.27 regulation. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Supreme Court explained that an agency action filling a "gap" left by a statute for the agency to fill should be upheld as long as it is both consistent with the language of the statute and reasonable.[13] *Id.* at 842-844. EPA's interpretation of the CWA in section 122.27 merits deference because Congress authorized EPA to fill such a "gap" in the CWA statutory framework. *See Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985) (noting that EPA's interpretation should be upheld as long as it "is a sufficiently ra-

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[13] The Court explained that where Congress "explicitly" leaves "a gap for the agency to fill ... legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute" and that where such a delegation is implicit instead of explicit "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844.

tional one to preclude a court from substituting its judgment for that of EPA."); *accord EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 83-84 (1980).

In particular, sections 304(f) and 208 of the Act require EPA to identify when silvicultural activities involve "point sources" and when they involve "nonpoint sources." Section 304(f) required EPA to issue "guidelines for identifying and evaluating the nature and extent of *nonpoint sources of pollutants*" and to address methods to control pollution resulting from "*agricultural and silvicultural activities, including runoff from fields and crops and forest lands.*"[14] 33 U.S.C. § 1314(f)(emphasis added). Section 208 of the Act also required EPA to support the states in developing "a process to (i) identify, if appropriate, agriculturally and *silviculturally related nonpoint sources of pollution*, ..., and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources." 33 U.S.C. § 1288(b)(2)(F)(emphases added). Therefore, to comply with these mandates, EPA must distinguish the nonpoint sources that are to be addressed through section 304(f) guidelines and section 208 control strategies from the point sources that require permitting under the NPDES program.[15]

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[14] EPA began making these determinations with respect to silvicultural activities in 1973, one year after enactment of the CWA, when it published its 1973 Silvicultural Activities Report. *See* discussion *supra* at 12.

[15] The legislative history of the Act also suggests that Congress intended EPA to promulgate regulations defining point and nonpoint source pollution, especially in connection with agricultural and silvicultural activities. The House Report to the 1972 Act noted that "[t]he Committee . . . expects the Administrator to be most diligent in gathering and distribution of the guide-

Critically as well, the definition of "point source" in section 502(14) of the Act leaves EPA with discretion to define the line between point source and nonpoint source discharges. Courts have so recognized. In *Forsgren*, for example, the Ninth Circuit acknowledged that "EPA has some power to define point source and nonpoint source pollution *where there is room for reasonable interpretation of the statutory definition*." 309 F.3d at 1190 (emphasis in original). The D.C. Circuit similarly explained that the definition of point source leaves room for "some exclusion [from the NPDES program] by interpretation." *NRDC v. Costle*, 568 F.2d at 1377; *see also National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 167 (D.C. Cir. 1982) (noting that Congress meant for EPA to have "at least some power" to define the term "point source").

In summary, unlike the district court in *EPIC*, this court should defer to both EPA's interpretation

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lines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution *from such nonpoint sources as agricultural and silvicultural activities*." H.R. Rep. No. 92-911, at 109 (1972) (emphasis added); *see also* 117 Cong. Rec. 38,816 (1971) (statement of Sen. Muskie) ("Guidance with respect to the identification of 'point sources' and 'nonpoint sources,' especially as related to agriculture, will be provided in regulations and guidelines of the Administrator"). When adding section 319 to the statute in 1987, Congress specifically recognized silvicultural roads and culverts as nonpoint sources. The Senate Report accompanying S. 1128, an earlier version of the 1987 bill, recognized that the "best management practices" that could be included in a state's section 319 program include "reducing runoff from ... *silvicultural areas (e.g., careful road placement, culverting, grassing of abandoned roads and skid trails*." Leg. Hist. Of Water Quality Act of 1987 (Vol. 2) 1420, 1456; Senate Report 99-50 at 35-36 (May 14, 1985) (emphasis added).

of its section 122.27 rule, and the rule itself, and should not substitute its judgment for that of the EPA.

B. EPA Has Chosen Not to Regulate Point Source Discharges from Forestry Roads Under Section 402(p) Of The CWA.

On top of all this, precipitation-driven discharges from the forestry roads at issue in this case, including discharges through ditches and culverts, do not violate the Clean Water Act because these discharges are excluded from the permitting program under section 402(p) of the CWA. First, runoff that is generated by precipitation and channeled by forestry roads is properly analyzed under 402(p) because it is a form of storm water.[16] Second, even supposing that there are point source discharges at issue in this case, any such discharges are not subject to the NPDES permitting requirements under EPA's storm water program. Therefore, any point source discharges associated with forestry roads are in compliance with section 402, and are not unlawful under section 301(a).

1. Storm water from forest roads is not covered by section 402(p)(2) and EPA's Storm Water regulations.

NEDC cannot squeeze "forestry roads" into EPA's storm water regulations. Under a plain read-

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[16] NEDC's complaint makes no suggestion to the contrary. Also, while the term "storm water discharge" is not defined in the Act, the ordinary meaning of the term "storm water" is precipitation-driven runoff. EPA regulations define the term "storm water" accordingly as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13).

ing of section 402(p) and EPA's implementing regulations, the storm water discharges at issue here are not required to obtain NPDES permits because: (1) they do not fall within the five "Phase I" categories expressly designated by Congress to receive NPDES permits under section 402(p)(2); (2) they are not included within the two additional categories promulgated by EPA in its "Phase II" regulations, *see* 40 C.F.R. § 122.26(a)(9)(I); and (3) they have not been designated for NPDES permits either individually or categorically under the statutory and regulatory residual designation authorities, *see* 402(p)(2)(E) and 40 C.F.R. § 122.26(a)(9)(i)(C) & (D).

The Ninth Circuit has recognized the limited scope of section 402(p)'s permitting requirements. In 1999, EPA exercised its broad authority under sections 402(p)(5) and 402(p)(6) of the CWA to promulgate the Phase II rules, in which EPA required NPDES permits for some, but by no means all, storm water point sources. *See* 64 Fed. Reg. 68,722, 68,734 (Dec. 8, 1999) (preamble to Phase II storm water regulations noting that the rules excluded millions of storm water discharges from coverage under the NPDES program). Among the categories that EPA expressly chose not to include in the Phase II rules was forestry roads. In *EDC*, environmental groups challenged EPA's Phase II regulations arguing that the rule wrongly failed to require NPDES permitting of storm water discharges from forestry roads. *See* 344 F.3d at 861. While the court remanded the rules to EPA to explain *why* the agency chose not to regulate runoff from forestry roads under Phase II, the court upheld EPA's authority to regulate less-than-all remaining point source storm water discharges under section 402(p)(6), stating as follows:

> EPA was free to adopt any regulatory program, including a permitting program, that included . . . [specific] elements. It is more reasonable to interpret congressional silence about permits as an indication of EPA's flexibility not to use them than as an outright prohibition.

Id. at 844 (citation omitted). The court also upheld EPA's residual designation authority. *See* 344 F.3d at 875-6. This authority would not have been necessary if *all* remaining point source discharges of storm water automatically required permits.[17]

Likewise, in *CLF* the U.S. District Court for Vermont found that section 402(p) exempts numerous storm water discharges. *CLF*, 327 F. Supp. 2d 325. This decision was affirmed by the U.S. Court of Appeals for the Second Circuit. *See CLF*, 139 Fed. Appx. 3381 (2d Cir. 2005). In reaching this holding, the court looked to both the plain language of the section as well as to the legislative history to find it "replete with evidence that Congress was concerned with the overwhelming and unnecessary regulation created by the absolute prohibition on all stormwater

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[17] As already noted above, the Ninth Circuit only remanded the regulation to EPA to explain its decision not to regulate forestry roads: it did not vacate EPA's Phase II regulations. Thus, EPA's Phase II regulations are still valid, and these rules do not subject to the NPDES permitting requirements any storm water discharges from forestry activities not included in the section 122.27 definition of "silvicultural point source."

discharges that existed before the enactment of the Water Quality Act."[18] *Id.* at 332.

Nevertheless, in this case NEDC asserts that forestry roads are already included within discharges "associated with industrial activity," which is one of the five original Phase I categories for which Congress required NPDES permits. 33 U.S.C. § 1342(p)(2)(B). NEDC argues that the term "industrial activity," as defined at 40 C.F.R. § 122.26(b)(14), includes facilities classified under Standard Industrial Classification code ("SIC code") 24. FAC, ¶53. NEDC then argues that logging roads are properly classified as SIC code 2411, which is a subcategory of SIC 24. *Id.* NEDC's argument thus turns on the proper interpretation of the term "industrial activity" in EPA's Phase I regulations; on the placement of forestry roads in the SIC Codes; and on the role of the regulatory language excluding activities. *See* 40 C.F.R. § 122.26(b)(14). But EPA never contemplated that forestry roads would be included within the industrial activities subject to the Phase I regulations.

First, the plain language of the regulatory definition, read as a whole, does not support a reading of the phrase "stormwater discharge associated with industrial activity" to include forestry roads. The first sentence of the definition limits this term to "the discharge from any conveyance that is used for collecting and conveying stormwater and that is *directly* related to *manufacturing, processing, or raw materials storage areas at an industrial plant.* 40

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[18] Of course, this "absolute prohibition" on storm water discharges only referred to "point source" storm water discharges, which did not include exempted forestry activities.

C.F.R. § 122.26(b)(14) (emphases added). The forestry roads at issue in this case are not "industrial activities" within the traditional sense of this definition, because they are not "directly related" to activities associated with an "industrial plant" under any plain language reading of the regulation.[19] The preamble to the 1990 regulations also underscores the link between the Phase I storm water permitting requirements and industrial facilities, explaining that the "[e]stablishments identified under SIC 24 (except 2434) are engaged in operating sawmills, planning mills and other mills engaged in producing lumber and wood basic materials."[20] 55 Fed. Reg. at 48,008.

Second, contrary to NEDC's argument, EPA never contemplated that the forestry roads at issue in this case would fit within SIC code 24 (Lumber and Wood). Forestry roads are inherently multi-purpose and serve several activities that fall within both SIC code 8 (Forestry) and SIC code 24 (which includes "logging activities"). *See* Executive Office of the President, Office of Management and Budget, *Standard Industrial Classification Manual* (1987) at 35, 107 (excerpts attached as Exhibit C). For example, even a

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[19] EPA has categorized discharges from abandoned mines as ones "associated with industrial activity" under its Phase I regulations, and the Ninth Circuit upheld EPA's decision to do so in *American Mining Congress v. EPA*, 965 F.2d 759. Forestry roads and silvicultural harvesting, however, are unlike mining activities and more closely resemble agricultural land uses than industrial ones.

[20] Also, nothing in EPA's Phase I regulation of activities within SIC code 24 suggests that the agency intended this section to address runoff from roads used for purposes outside of SIC code 24.

road used primarily for logging will inevitably also be used before, after, and during harvesting activities to support activities that fall within SIC code 8, such as SIC code 811 ("establishments primarily engaged in operation of timber tracts or tree farms for purposes of selling timber") and SIC code 851 ("forestry services"). *Id.* at 35. These SIC code 8 activities include cruising timber, fire prevention, firefighting, pest management, and reforestation activities. *Id.* Finally, most forestry roads also serve recreational purposes. *See, e.g.*, FAC at ¶ 2 (suggesting that the Sam Downs Road provides access to the "Mapes Creek boat ramp"). Therefore, on balance, forestry roads fit best within SIC code 8.[21]

Third, even assuming *arguendo* that forestry roads fit within SIC Code 24, such activities are still excluded from the program by effect of EPA's silvicultural point source regulation. EPA's Phase I storm water rule provides that the regulation "does not include discharges from facilities or activities excluded from the NPDES program under this part 122." 40 C.F.R. § 122.26(b)(14). In promulgating this rule, EPA expressly noted that "the definition of 'storm-water discharge associated with an industrial activity' does not include sources that may be included under SIC 24, but which are excluded under 40 C.F.R. 122.27." *See* 55 Fed. Reg. 47,990, 48,011 (Nov. 16, 1990). As explained in detail in section A of this brief above, EPA has long viewed runoff from forestry

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[21] Because logging roads are not properly classified in SIC code 24, the further question of what particular tree cutting or processing activities are encompassed by the inclusion of "logging activities" in SIC code 24 is not presented in this case. In any event, most such activities will not involve point sources, as set forth in EPA's silvicultural point source rule.

roads as excluded under 40 C.F.R. § 122.27. Thus, even supposing forestry roads do fall within SIC Code 24, this Court should defer to EPA's long-standing interpretations of both its storm water rule and its silvicultural point source rule.

EPA confirmed that forestry roads are not covered by the Phase I regulations in a 1995 report to Congress on its Phase II Storm Water study, explaining that the NPDES regulations specifically exempt "runoff from agricultural and silvicultural activities (mostly within SIC codes 01-09)." EPA, *Storm Water Discharges Potentially Addressed by Phase II of the NPDES Storm Water Program, Report to Congress*, at 2-23, n.8 (March 1995) (excerpts attached as Exhibit B).[22] This report discusses those timber product facilities that are point sources within the Phase I regulations, but never mentions silvicultural harvesting or road construction or maintenance activities. *Id.* at E2-E3.

Most importantly, the history of judicial review of EPA's Phase II regulations strongly suggests that the Phase I regulations do not cover discharges associated with forestry roads. Section 402(p)(6) of the CWA required EPA to promulgate the Phase II regulations, and EPA adopted these rules on December 18, 1999. *See* 64 Fed. Reg. 68,722 (codified at 40 C.F.R. §§ 9, 122, 123 and 124). As discussed in detail below, the Ninth Circuit later remanded portions of

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[22] EPA's 1995 Phase II Report to Congress is entitled to deference according to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncement, and all those factors which give it power to persuade . . . ." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

these rules to EPA to determine whether "§ 402(p)(6) requires EPA to regulate forestry roads." *EDC*, 344 F.3d at 863. Obviously, if forestry roads were already covered by Phase I, this remand would have been unnecessary.

In summary, the United States reaffirms its interpretation of EPA's storm water regulations to exclude forestry road construction and maintenance activities. EPA's interpretation of the storm water rules, as contained in this *amicus* brief, is entitled to deference. *See Auer*, 519 U.S. at 461.

2. In the EPIC case, the Northern District of California wrongly interpreted section 402(p) in direct conflict with the Ninth Circuit's decision in EDC.

For all of the reasons presented above, storm water discharges from forestry roads are not covered by either EPA's Phase I or Phase II regulations. Once again, the only precedent to support NEDC's argument is *EPIC*, 301 F. Supp. 2d 1102. But, the *EPIC* court misapplied section 402(p) of the CWA. *EPIC*'s reading of section 402(p) contradicts both the plain language of the statute, and the Ninth Circuit's decision in *EDC*, 344 F.3d 832.

In *EPIC*, the court cited two reasons for its holding that section 402(p) did not apply to the discharges from forestry roads at issue in that case. First, the court found that these discharges did not consist "'entirely' of storm water." 301 F. Supp. 2d at 1111. In making this finding, the court referred to the fact that the *EPIC* complaint alleged that the defendants discharged "storm water and *pollutants*" from point sources. *Id.* (emphasis in original).

Second, the court found that in order for section 402(p) to apply, the discharges must have been "'unregulated'—both as a matter of time and a matter of law—at the time of the 1987 amendments." *Id.* The court then reasoned that since the forestry road discharges at issue there were considered point sources in 1987, they could not be considered "unregulated" for purposes of section 402(p). These rulings misconstrue the purposes and meaning of section 402(p) and directly conflict with the Ninth Circuit's *EDC* decision upholding in nearly all respects EPA's Phase II storm water regulations.

With respect to the court's first threshold question—whether the forestry road discharges at issue in that case were composed entirely of storm water—the court appeared to find that section 402(p) applies, as a matter of law, only if a storm water discharge contains no pollutants. This finding misreads the requirements of the Clean Water Act. *See, e.g.*, *EDC*, 344 F.3d at 842 ("[t]he CWA clearly acknowledges that stormwater, by its nature, is often polluted"). First, the CWA clearly states that there must be an "addition of a pollutant" for a discharge to be subject to regulation. *See* 33 U.S.C. §§ 1311(a), 1362. This principle is also recognized in section 402(a), which authorizes issuance of permits "for the discharge of pollutants," and in section 402(p)(5), which requires EPA to study the sources of and "the extent of pollutants" in storm water discharges. 33 U.S.C. §§ 1342(a), 1342(p)(5). As EPA made clear in response to comments on the definition of storm water contained in its Phase I storm water regulations, "the entire thrust of today's regulation is to control *pollutants* that enter receiving water *from storm water conveyances*." 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990) (emphasis added). Thus, the phrase

in section 402(p)(1)—"discharges composed entirely of stormwater"—simply cannot support the reading apparently assigned by the *EPIC* court.

Indeed, rather than referring to the absence of pollutants, the phrase "composed entirely of stormwater" refers to the absence of non-storm water discharges, such as discharges from sanitary sewers and industrial processes. *See* 55 Fed. Reg. at 47,995. Thus, a discharge composed "entirely of stormwater" is one that is not intermingled with other waste streams, such as "process wastewater" discharges from industrial operations. *See, e.g.*, 40 C.F.R. § 430.01(m) (defining "process wastewater" as "any water that, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product."). Thus, the phrase "composed entirely of stormwater" is similar in meaning to the term "natural runoff in section 122.27. Also, as discussed above, EPA's interpretation of the phrase "composed entirely of storm water discharges" is entitled to substantial deference. *See Auer*, 519 U.S. at 461. Nonetheless, the *EPIC* court inexplicably neglected to address these basic tenets of administrative law, and failed to accord EPA any deference.

With respect to the court's second threshold test—whether the discharges at issue are "unregulated"—the *EPIC* court found that any point source that was required to obtain an NPDES permit prior to the 1987 amendments is not the kind of previously 'unregulated' category at issue in the Phase II regulations. *See EPIC*, 301 F. Supp. 2d 1112. However, all storm water point source discharges were required to secure an NPDES permit prior to the 1987

amendments. Thus, *EPIC's* interpretation effectively reads section 402(p) out of the CWA.

Prior to the 1987 amendments, the requirement that all point source discharges of storm water secure NPDES permits created problems recognized by Congress in 1987. Since up to that time neither EPA nor approved states had been able to issue permits to the millions of sources technically required to obtain them under the then-existing section 402 of the CWA, the purpose of the 1987 amendments was to address precisely this problem by excluding many point sources from the program.[23] Congress thus put

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[23] See, for example, the statement of Representative Rowland:

> In particular, I want to express my appreciation for the chairman's willingness to incorporate the recommendations I had made during the committee process to address the dilemma in issuing permits ad infinitum for common stormwater discharges.
>
> Under existing law, the Environmental Protection Agency must require National Pollutant Discharge Elimination System (NPDES) permits for anyone who has stormwater runoff on their property. What we are talking about is potentially thousands of permits for churches, schools, residential property, runoff that poses no environmental threat and does not warrant the expense and dilution of personnel and resources that would be required to permit and monitor these harmless discharges.
>
> It was not the intent of Congress that permits be required for every case of stormwater runoff, but due to recent court decisions mandating such extensive permitting, EPA must have the statutory authority to inject some reason back into this process.

131 Cong. Rec. H5993, H5997 (July 22, 1985) (statement of Rep. Rowland). Further, as Rep. Hammerschmidt noted:

> The new language will properly reduce the universe of permits required for storm water from millions to thousands

into effect the two-phased permitting scheme discussed above, which required EPA first to require NPDES permits for the most significant sources of storm water identified in section 402(p)(2) and to then study the remaining sources of storm water to determine which additional sources needed to be regulated "to mitigate impacts on water quality," and by what means. 33 U.S.C. § 1342(p)(5)-(6). In identifying such remaining sources—*all* of which required NPDES permits under the CWA prior to the 1987 amendment—EPA estimated there were more than 7.7 million total sources of point sources of storm water, only 1.5 million of which were accounted for in the identification of all Phase I facilities plus the facilities in the principal groups of additional sources EPA *considered* for coverage in the Phase II regulations. *See* EPA's March 1995 Report to Congress, at 4-21 (excerpts attached as Exhibit B). Relying on the results of this study and on other EPA analyses, the agency issued final Phase II storm water regulations additionally designating two categories of storm water sources for coverage under Phase II.

We also noted that, in addition to authorizing the agency to decide *whether* to regulate particular storm water sources under Phase II, section 402(p)(6) also authorizes EPA to decide *how* to regulate the sources it chose to include in Phase II. Nothing in that sec-

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without reducing the protection of the environment. We established a mechanism that will require permits only where necessary-rather than in every instance. Without these changes, local, State, and Federal officials would be inundated with an enormous permitting workload even though most of the discharges would not have significant environmental impacts.

133 Cong. Rec. H168, H170 (January 8, 1987) (statement of Rep. Hammerschmidt).

tion compels EPA to use the NPDES permitting program as the regulatory tool. Indeed, while EPA chose to subject Phase II storm water sources to NPDES permitting, the Ninth Circuit in *EDC* expressly recognized that "EPA was free to adopt any regulatory program including a permitting program" in its Phase II regulations. *EDC*, 344 F.3d at 844.

In short, the holding in *EPIC* is inconsistent with the plain language of the statute, its legislative history, EPA regulations, and relevant case law. Moreover, *EPIC's* reading of 402(p) could force the agency to considerably expand the universe of storm water point sources that it must regulate, directly contravening Congress's purpose in enacting section 402(p). The EPIC court substituted its judgment for EPA's about when to regulate such dischargers and how to set priorities for such regulation. Therefore, this Court should follow the Ninth Circuit's holding in *EDC* and the Vermont District Court's decision in *CLF* (which was upheld by the Second Circuit) to reject *EPIC's* misreading of section 402(p).

V. CONCLUSION

EPA's silvicultural point source regulations at 40 C.F.R. § 122.27 define the discharges from forestry roads at issue in this case as nonpoint sources that do not require NPDES permits. Additionally, EPA has adopted storm water regulations at 40 C.F.R. § 122.26 providing that point source storm water discharges that are not expressly covered by these regulations are not required to obtain NPDES permits. Under EPA's interpretation of these regulations and section 402(p) itself, discharges from the forestry roads at issue in this case are not subject to an NPDES permit requirement. Therefore, these discharges comply with section 402. As such, these dis-

charges also comply with section 301(a), even in the absence of an NPDES permit.

For these reasons, and pursuant to all the arguments set forth above, this Court should grant defendants' motions to dismiss.

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[Signature block omitted in printing]